Albertson's, Inc. *and* United Food and Commercial Workers Union Locals 4, 7, 8, 44, 99r, 101, 120, 135, 325, 367, 368A, 373, 381, 394, 428, 555, 588, 770, 839, 870, 1036, 1105, 1167, 1428, 1439, and 1442, affiliated with United Food and Commercial Workers International Union¹

Albertson's, Inc. *and* International Brotherhood of Teamsters, Local 537

Albertson's, Inc. and Bakery, Confectionery, and Tobacco Workers' Union, Local 119, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, CLC

Albertson's, Inc. *and* **Stuart Fishman.** Cases 27–CA–13390, 27–CA–14469, 27–CA–14507, 27–CA–14925–2, 27–CA–15106, 27–CA–15106–2, 27–CA–15157, 27–CA–15677, 27–CA–15677–2–8, 27–CA–15677–10–19, 27–CA–15677–22–25, 27–CA–15733, and 27–CA–15865

September 29, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On July 3, 2002, Administrative Law Judge Clifford H. Anderson issued the attached decision. Several affiliated local unions of United Food and Commercial Workers Union (UFCW Local Unions) filed joint exceptions and a joint supporting brief. The Respondent filed exceptions, a supporting brief, and an answering brief to the UFCW Local Unions' exceptions. The General Counsel and International Brotherhood of Teamsters, Local 537 (Teamsters Local 537) filed separate answering briefs to the Respondent's exceptions. The Respondent filed reply briefs to the answering briefs.² Bakery, Confectionery, and Tobacco Workers' Union, Local 119 joined the UFCW Local Unions' exceptions and supporting brief and the General Counsel's and Teamsters Local 537's answering briefs. The UFCW Local Unions also joined the General Counsel's and Teamsters Local 537's briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions³ and briefs and has decided to affirm the judge's rulings, findings,⁴ and conclusions as modified⁵ and to adopt the recommended Order as modified and set forth in full below.

This proceeding involves the Respondent's interactions with a number of unions that represent different units of its employees at certain facilities located in the Respondent's Western Region and Rocky Mountain Division. The amended consolidated complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to satisfy its obligation to provide relevant information to several unions at various locations on many occasions, and also violated Section 8(a)(5) and (1) by instituting a unilateral change and by dealing directly with employees. The complaint also alleges a number of independent 8(a)(1) violations based on statements by certain Respondent officials or certain work rules that the Respondent maintained. Lastly, the complaint alleges that written warnings to two employees violated Section 8(a)(3) and (1). The judge found numerous violations, but dismissed other allegations of the complaint. He also recommended a number of extraordinary remedies. Except as explained below, we adopt the judge's findings of violations and his dismissals but we substantially modify the remedy to be imposed.⁶

¹ We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL-CIO effective July 29, 2005.

² In its reply brief to the General Counsel's answering brief, the Respondent seeks, for the first time, deferral of the information request allegations of the complaint to existing contractual grievance/arbitration procedures. The Respondent never submitted a similar request for deferral in its answer to the outstanding complaint or at any time during the hearing held before the judge. We find that the Respondent's belated deferral request in its reply brief was untimely raised, and we reject it on that basis. See *Teamsters Local 500 (Acme Markets)*, 340 NLRB 251 fn. 1 (2003).

³ There are no exceptions to the judge's decision pertaining to complaint pars. 5(c)(iii) and (e)(v), and 8(g), (f), (h)(i), and (h)(ii).

⁴ The Respondent and the UFCW Local Unions have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We have corrected several inadvertent errors made by the judge in his decision, such as misspellings, typographical errors, misnomers, and mistaken references. These inadvertent errors have not affected our disposition of this consolidated case.

⁵ We have modified the judge's conclusions of law and recommended remedy and Order to conform to the violations found. We also have substituted new notices that reflect these changes.

In par. 3 of his conclusions of law, the judge described various bargaining units of the Respondent's employees, consistent with the outstanding complaint allegations. The parties stipulated that there was an appropriate bargaining unit at each location covered by the collective-bargaining agreements involved in this proceeding. The parties agreed that their stipulation, in its entirety, applies only to the litigation of the instant cases and is not to be used in other proceedings. They further agreed that the Respondent does not acknowledge the accuracy of specific collective-bargaining unit descriptions contained in the amended consolidated complaint.

⁶ We find no merit in the exceptions relating to complaint pars. 5(b) and (e), 8(i), 57–63, 65–69, 70, 72, 74–77, 83(a) and (b), and 84 except for those exceptions relating to pars. 58(c) (meeting minutes) and (d),

1. Complaint paragraphs 58(c) and 65(a)(iii)

Complaint paragraph 58(c) involves UFCW Local 394's request for certain information relating to a pending grievance about the Company's pension plan, including minutes of a meeting allegedly held to discuss and pass an amendment to that plan. Christopher Yost, an attorney working at the Respondent's labor relations department in Boise, Idaho, credibly testified at the hearing that no such meeting occurred and that no meeting minutes existed. However, Yost never notified the Union of that fact.

Complaint paragraph 65(a)(iii) concerns Teamsters Local 537's request for information relating to a grievance involving employee Martin Tara. The Teamsters asked for "copies of documents, witness statements and/or supervisor reports upon which the company believes it had cause to discipline Mr. Tara." In response, Barbara Newell, a Boise labor relations department contract administrator, provided some information but no witness statements. Such documents never existed. Several months later, Newell notified the Teamsters, for the first time, that there were no witness statements concerning Tara's discipline.

The General Counsel's complaint paragraphs 58(c) and 65(a)(iii) allege that the Respondent unlawfully delayed, failed, and refused to furnish the "meeting minutes" and "witness statements" to the requesting Unions. The complaint contained no alternative allegation that the Respondent failed to timely inform the Unions that the requested "meeting minutes" and "witness statements" did not exist. Nevertheless, based on the complaint paragraphs, the judge found that the Respondent had violated Section 8(a)(5) and (1) of the Act by "silent nondisclosure" to Local 394 and "delayed disclosure" to the Teamsters.

We reverse the judge and find that he erred in finding violations of the Act that were not encompassed by the complaint allegations. Under the standard set forth in *Raley's Supermarkets*, 349 NLRB 26, 28 (2007), the General Counsel must specifically allege that the failure

65(a)(iii) (witness statements), and 69. We find those latter exceptions have merit, and we reverse the judge and dismiss those allegations for the reasons we explain below. We also note that the exceptions to complaint par. 63 are limited, in that they only challenge the judge's rejection of the Respondent's laches defense and his evidentiary allowances precipitated by the unavailability of the deceased Beverly Erickson, a potential witness in this case. Also, regarding complaint par. 60, we find it unnecessary to pass on the judge's finding that the Respondent's conduct prior to mid-July 1996 was unlawful because this additional violation of Sec. 8(a)(5) and (1) would be cumulative and would not affect our remedy. Thus, we do not rely on the judge's discussion in the fifth paragraph of sec. III,D,2(a), 3(b), and fn. 17 of his decision.

Member Walsh dissents from certain of those findings, as indicated below.

to inform the union that requested documents do not exist (or the delayed communication of that fact) was unlawful. The instant complaint, which does not even mention the nonexistence of the documents, plainly fails to satisfy this pleading requirement. Thus, we decline to adopt the 8(a)(5) and (1) violations found by the judge with respect to the meeting minutes and the witness statements.⁷

2. Complaint paragraph 58(d)

On December 4, 1996, UFCW Local 394 President Tom Johnson sent the Respondent a letter requesting ongoing notification of new hires, transfers in and out of the bargaining unit, employee terminations, and employee leaves of absences affecting store 845 in Rapid City, South Dakota. On February 3, 1997, the Respondent's attorney, Yost, responded by directing Johnson to contact Randy Stewart, the store director, for the purpose of obtaining the requested information at the store level. Several times in the following months, Johnson obtained the requested information directly from Stewart. The judge found that the Respondent unlawfully delayed furnishing the requested information to the Union, as alleged by paragraph 58(d) of the amended consolidated complaint. We disagree.

We interpret Johnson's information request as seeking notification of several kinds of personnel actions "within 10 days" of their occurrence, and an on-going process for the Respondent's future provision of such information to Local 394. Regarding the first aspect of Johnson's request, we find that the General Counsel failed to establish that the Respondent delayed or acted unreasonably in directing Johnson to contact the store director in February. There is no evidence in the record showing that any hires, transfers, terminations, or leaves of absences, i.e., the triggering events identified by Johnson's letter, occurred between December 4 and February 3 to warrant an earlier response from the Respondent. The judge attempted to finesse this evidentiary problem by assuming that "the size of the bargaining unit is such on this record that change is statistically inevitable and that the Union could reasonably expect reported updates more often than every two months." Without any underlying facts about store 845's actual operations during this 2-month period, however, the judge's assumption was unfounded and cannot serve as a substitute for proof that any triggering events actually occurred. Absent evidence that the Respondent was obligated to respond to the Union

⁷ Member Walsh would find the violations alleged in complaint pars. 58(c) and 65(a)(iii), for the reasons stated by the judge. Unlike his colleagues, Member Walsh agrees with the dissenting opinion of Member Liebman in *Raley's Supermarkets*, supra, slip op. at 4–5.

before February 3, we find no violation regarding the Respondent's response to this aspect of Johnson's request for information.

With respect to the second part of Johnson's request, the record contains substantial evidence that Johnson and Stewart worked together successfully regarding future, regular transmittals of the requested personnel data to Local 394. Johnson never complained that his dealings with Stewart on this matter were protracted, unproductive, uncooperative, or unsatisfactory. In fact, the ongoing notification system that Stewart and Johnson mutually developed was promptly implemented and apparently worked well thereafter. Thus, we reverse the judge's finding that the Respondent's conduct was unlawful and dismiss the entire complaint allegation.

3. Complaint paragraph 69

On February 18, 1997, UFCW Local 7 requested information relating to the remedy for a grievance involving employee Amos Varos, and asked that the information be supplied by April 21, 1997. On March 5, 1997, the Respondent claimed that the information sought by Local 7 was "confidential" to Varos, and directed the Union to seek a "signed and notarized approval" from Varos to release the requested information. Local 7 refused to do so, and it filed an unfair labor practice charge against the Respondent on March 11, 1997. On March 20, 1997, the Respondent provided the requested information concerning Varos to the Union.

The judge found that the Respondent's March 5 letter unlawfully imposed, by mistake, a precondition on the submission of the information to the Union. He also found that the Respondent retracted its mistake and turned over the requested information approximately 9 days after the filing of Local 7's charge. The judge found that the presence of numerous other information request violations by the Respondent in this case prevented him from finding that the Respondent's March 5 conduct was de minimis or was remedied by the Respondent's subsequent March 20 production of information to the Union, and thus he found a violation.

The Respondent argues that it fully satisfied Local 7's information request and that its March 5 letter did not impose any precondition (improper or otherwise) on the release of the requested information to Local 7. The Respondent alternatively claims that, in any event, any flaw in its March 5 letter was quickly corrected, the requested information was timely provided more than a month before Local 7's self-imposed deadline, and Local 7 suffered no injury from the Respondent's actions.

Unlike the judge, we view this incident as isolated and de minimis, and we do not consider it as part of any larger pattern of unlawful conduct by the Respondent. The evidence persuades us that the March 5 letter's reference to approval by Varos was a simple mistake that was quickly and effectively corrected soon after the matter was brought to the Respondent's attention. The March 5 letter caused little, if any, actual interference with the Respondent's timely production of the requested information to Local 7 within the deadline the union imposed. Given these circumstances, we find no violation of the Act and dismiss this complaint allegation on de minimis grounds.⁸

4. Complaint paragraph 79 (other badges rule)

The Respondent has maintained a rule prohibiting employees from wearing badges and pins (other than name badges) at its retail stores, unless authorized by the store directors. On its face, this ban would cover union badges and pins of all types and sizes, would apply to all store employees during their nonworking time as well as their working time, and would encompass all store areas, including any break or lunchrooms designated for employee use. The judge found that the rule was overbroad and that the Respondent failed to establish any special circumstances to justify the rule. The judge concluded that the other badges rule improperly restricted employees' union and protected concerted activities in violation of Section 8(a)(1) of the Act. We adopt the judge's findings and conclusion for the following reasons.

Like the judge, we reject the Respondent's collateral estoppel and res judicata defenses. ¹⁰ Our consideration of the legality of the other badges rule is not barred by the decision in *NLRB v. Albertson's, Inc.*, 17 F.3d 395 (9th Cir. 1994), a case primarily relied on by the Respondent in support of its position. In that case, the

⁸ See, e.g., *NLRB v. Motorola, Inc.*, 991 F.2d 278, 283 (5th Cir. 1993), denying enf. in relevant part 305 NLRB 580 (1991) ("Not every interference with employee rights rises to the level of an unfair labor practice; federal courts have consistently held that marginal infringements do not violate the Act.").

Member Walsh would find the violation alleged in complaint par. 69, for the reasons stated by the judge. Member Walsh considers it appropriate to consider the Respondent's other unlawful conduct when evaluating a refusal to furnish information allegation; analyzing the facts in that manner, he would not find that the misconduct alleged in par. 69 was de minimus.

⁹ The rule, which appears in the Respondent's company personnel policies sheet, reads:

All store employees must wear uniforms or aprons as provided or other clothing with name badges on the left chest. *No other badges or pins shall be worn unless authorized by the Store Director.* [Emphasis added]

¹⁰ In a prior 1995 decision involving the Respondent, the Board adopted, in the absence of exceptions, a badge-rule violation found by the judge in that case. See *Albertson's, Inc.*, 319 NLRB 93 fn. 1 (1995). In these circumstances, we neither consider nor rely on the parties' interpretation of the judge's unexcepted-to badge-rule findings reported at 319 NLRB at 101–103 and fn. 44.

Ninth Circuit denied enforcement of an earlier Board decision that dealt with whether the Respondent lawfully could restrict the wearing of union insignia in a particular location, i.e., the selling areas, as opposed to nonselling areas, of its stores. In contrast, the instant case focuses on the Respondent's efforts completely to ban badges and pins throughout its stores at all times and to impose a company-authorization prerequisite that would impede the exercise of employees' Section 7 rights. Thus, the earlier case cited by the Respondent is distinguishable from the instant case on its facts and necessitated a different legal analysis by the Board and the court.

We also agree with the judge's finding that the other badges rule did not pass muster under controlling legal precedent.¹¹ An employee's right to wear union insignia while at work generally is protected by Section 7 of the Act, and an employer may not interfere with that right absent a showing of special circumstances, such as the need to maintain production or discipline, or to ensure safety. 12 The Respondent offered no evidence in this case that the other badges rule was necessary to maintain employee production or discipline or to ensure safety in its chain of supermarkets.¹³ The Respondent instead relied on general testimony from Dona Pike King, its Boise labor relations department counsel, that "[w]e want our employees to have a clean, uniform business appearance so that they're easily identified" by the customers. However, it is well established that a company's status as a retail employer does not, standing alone, constitute a special circumstance justifying the proscription of union insignia.¹⁴ Thus, the proffered customer-identification explanation for the other badges rule fails to meet the Respondent's burden of establishing the presence of "special circumstances" to justify the rule's broad proscriptions.

5. Complaint paragraph 79 (no-solicitation rules)

The Respondent has maintained nationwide nosolicitation rules applicable to its chain of supermarkets, including approximately 435 stores located in California. The rules in question proscribe nonemployee solicitations and distributions of literature or information on the Respondent's premises at all times.¹⁵ These rules were not initiated in response to any union or protected concerted activity, and there was no evidence that the Respondent disciplined any employee (or took action against any nonemployee) under these rules for engaging in union or protected concerted activity on company premises in the State of California or elsewhere. In fact, the Respondent's actual enforcement practices regarding these rules are not at issue in this proceeding. Instead, this case involves a facial challenge to the Respondent's maintenance of these rules in California.

The judge found that the legality of the maintenance of these rules turned on whether the Respondent could show that it had an interest under California State law which entitled it to exclude nonemployees, including union organizers, or limit such individuals' activities on its California property. The judge found that the Respondent failed to make this threshold showing, and that the rules therefore constituted overly broad restrictions on union and protected concerted activity in violation of Section 8(a)(1) of the Act. The judge recommended that these no-solicitation rules be rescinded and withdrawn at the Respondent's California stores. We reverse the judge and find no violation.

In Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), the Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property, absent extraordinary circumstances (such as where employees are inaccessible through alternative means). In the absence of a private property right, however, the Court's holding in *Lechmere* is not controlling. See Glendale Associates, Ltd., 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003). The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. Id. California constitutional law limits a private property owner's right to exclude persons seeking access for purposes of exercising their free speech rights "if the property is freely and openly accessible to the public." Golden Gateway Center v. Golden Gateway Tenants Assn., 26 Cal. 4th 1032, 1033 (2001). This constitutional provision applies to places that are the functional equivalent of a public forum, e.g., a shopping mall. George L. Mee Memorial Hospital, 348 NLRB 327, 331 (2006).

¹¹ See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Nordstrom, Inc., 264 NLRB 698, 700 (1982).

¹² See *Albis Plastics*, 335 NLRB 923, 924 (2001), and cases cited therein.

¹³ See Sunland Construction Co., 307 NLRB 1036, 1041 (1992).

¹⁴ See Ark Las Vegas Restaurant Corp., 335 NLRB 1284 fn. 1 (2001).

¹⁵ These rules appear in the Respondent's company personnel policies sheet and read, in pertinent part:

In the interest of preventing disruption of customers and employees, Albertson's has established no solicitation rules:

a. Non-employees: Solicitation and distribution of literature or information on company premises by anyone not employed by Albertson's is strictly prohibited.

A similar restriction on nonemployee solicitations is set forth in the Respondent's retail store employee handbook and provides:

Non-employees may not solicit, distribute literature or use sound devices on Company premises at any time.

Nonetheless, it is the General Counsel, in the first instance, who must show that the Respondent's California stores constitute the functional equivalent of a public forum. It is undisputed that the General Counsel failed to meet this burden. Thus, on this record, we find that the California constitutional provision does not apply in this case. Therefore, the Respondent's no-solicitation rules prohibiting nonemployees' activity on its premises do not violate Section 8(a)(1) of the Act. Accordingly, we dismiss this complaint allegation. The section 17

6. Complaint paragraph 79 (confidentiality, off-the-job conduct, and other misconduct rules)

The complaint alleged and the judge found that the Respondent violated Section 8(a)(1) by maintaining rules that subjected employees to immediate discharge for engaging in certain activity including the following: (1) disclosure of confidential information, (2) participation in activity described as "off-the-job conduct," and (3) involvement in activity described as "other misconduct." We agree that the Respondent unlawfully maintained the confidentiality rule, although on a different rationale. We do not adopt the judge's findings of violations regarding the other two rules, and we dismiss those allegations for the reasons stated below.

Initially, the judge correctly observed that the challenged rules "are sufficiently close" to comparable rules found lawful in *Lafayette Park Hotel*¹⁹ and its progeny.²⁰

¹⁶ In *George L. Mee Memorial Hospital*, supra at 31 fn. 20, we stated (emphasis in original):

Specifically, the Respondent's confidentiality rule resembles *Lafayette Park Hotel's* standard of conduct 17²¹ and *Super K-Mart*'s confidentiality provision.²² The Respondent's off-the-job conduct rule is similar to the off-duty misconduct rules in *Lafayette Park Hotel*²³ and *Flamingo Hilton-Laughlin*.²⁴ The other misconduct rule is similar to *Ark Las Vegas Restaurant*'s catch-all rule 68 ²⁵

The judge also properly recognized that the Respondent unlawfully used its confidentiality rule to discipline employee Mary Ford for engaging in protected concerted activity, namely providing employee names to assist UFCW Local Union 555's organizing campaign.²⁶ We agree that this unlawful application of that rule can be used to inform the meaning of the Respondent's confidentiality rule. The judge erred, however, in going further and considering Ford's discipline as an element in his interpretations of the other, unrelated off-the-job-conduct and other misconduct rules.

The judge also erred by lumping the three rules together in his analysis. In Lafayette Park Hotel, the Board separately examined each rule at issue to determine if that particular rule crossed the legal line. Compounding his error, the judge then imported into his analysis of the lawfulness of the individual rules the "broader context" of unrelated unfair labor practices involving other rules. Lafayette Park Hotel and its progeny provide no support for the judge's "broader context" approach. The Board in Lafayette Park Hotel found that two rules (one referring to false statements and the other pertaining to off-duty employees) were unlawful, but never used either

We recognize that a California *statutory* provision (the Moscone Act) arguably does apply to private properties even if they are not public forums. *Sears v. San Diego District Council of Carpenters*, 25 Cal. 3d 317 (1979). However, the D.C. Circuit has held that *Sears* does not represent California law, *NLRB v. Waremart Foods*, 354 F.3d 870 (D.C. Cir. 2004), and the Board has agreed that *Sears* "cannot be relied on as controlling California precedent." *Macerich Management Co.*, 345 NLRB [514, 516] (2005).

¹⁷ Member Walsh would find the no-solicitation/no-distribution rules at issue to be unlawful, for the reasons stated by the judge and those set forth in his partial dissent in *George L. Mee Memorial Hospital*, supra at 41. Member Walsh would find that the restrictions on nonemployees' activity on company premises were overbroad, and therefore unlawful.

¹⁸ These rules are set forth in the company personnel policies sheet and the retail store employee handbook. The confidentiality rule punishes employees for "[d]isclosing confidential information or any other similar act constituting disregard for the Company's best interest." The off-the-job-conduct rule prohibits employees from engaging in "[o]ff-the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity." The other misconduct rule prohibits employees from engaging in "[a]ny other misconduct which, in the Company's judgment, warrants immediate discharge."

¹⁹ 326 NLRB 824 (1998).

²⁰ Flamingo Hilton-Laughlin, 330 NLRB 287 (1999); Super K-Mart, 330 NLRB 263 (1999); and Ark Las Vegas Restaurant Corp., 335 NLRB 1284 (2001).

²¹ Standard of conduct 17 in *Lafayette Park Hotel*, supra at 826, states that the following conduct is unacceptable:

Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

 $^{^{22}}$ The confidentiality provision in *Super K-Mart*, supra at 263, states:

Company business and documents are confidential. Disclosure of such information is prohibited.

²³ In *Lafayette Park Hotel*, supra at 826–827, the employer's standard of conduct 31 states that the following conduct is unacceptable:

Unlawful or improper conduct off the hotel's premises or during nonworking hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community.

²⁴ In *Flamingo Hilton-Laughlin*, supra at 288, the employer maintained a rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel."
²⁵ Rule 68 in *Ark Las Vegas Restaurant*, supra at 1291, states:

Participating in any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company, or its guests, or that adversely affects job performance or your ability to report to work as scheduled.

²⁶ In this important respect, the instant case differs from *Lafayette Park Hotel*, where no employee was disciplined under the rules in question for engaging in union or other protected concerted activity.

rule violation as a basis for analyzing whether the hotel's maintenance of other rules (including those regarding confidentiality and off-duty misconduct) violated the Act. In fact, the Board found that Lafayette Park Hotel's maintenance of its confidentiality rule and its off-duty misconduct rule did not violate Section 8(a)(1). Likewise, we reject any attempt to find the three rules in the instant case invalid by bootstrapping them to other unrelated work rule violations.

We note that in determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Under this standard, the first inquiry is "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original.) Id. If so, the rule is unlawful; if not

the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. [Id. at 647.]

Applying these principles, we find that the Respondent has not violated Section 8(a)(1) by maintaining its off-the-job-conduct and other misconduct rules.²⁷ Neither rule expressly covers Section 7 activity, nor is there any evidence that the Respondent has applied either rule to protected activity or that the Respondent adopted either rule in response to protected activity. Similarly, we do not believe that either rule can reasonably be read as encompassing Section 7 activity. "To ascribe such a meaning to these words is, quite simply, farfetched." Employees reasonably would believe that these rules were "intended to reach serious misconduct, not conduct protected by the Act." Therefore, we dismiss these allegations.³⁰

The Respondent's confidentiality rule is in a different category. Although the confidentiality rule does not expressly cover Section 7 activity, and no evidence exists that the Respondent adopted this rule in response to protected activity, there is sufficient evidence showing that the Respondent applied the rule to restrict an employee's exercise of her Section 7 rights. The judge found, and we agree, that the Respondent unlawfully used its confidentiality rule to discipline employee Ford for providing a copy of the work schedule (with a listing of employee names) to assist UFCW Local Union 555's organizing efforts. Shortly following Ford's discipline, Respondent's agent, Dona Pike King, assembled employees together for a group meeting. At that meeting, King referred to the Ford incident and said that employee names were "confidential information" and as such were not to be disclosed to a union. Thus, unlike the situations involving the Respondent's off-the-job-conduct and other misconduct rules, there is a context of unlawful application of the confidentiality rule and a factual basis for employees reasonably to view the confidentiality rule as prohibiting Section 7 activity. In addition, the Respondent never tried to counter this linkage of the rule to protected activity by submitting evidence showing examples of the application of the confidentiality rule in other settings not involving union activity. Indeed, King's public comments at the group meeting for employees tend to weaken any claim that the Ford incident was somehow isolated and not a true indicator of the meaning of the Respondent's confidentiality rule. We therefore find that the maintenance of the confidentiality rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, we find an 8(a)(1) violation based on the maintenance of the Respondent's confidentiality rule.31

AMENDED REMEDY

The judge's recommended Order includes broad injunctive language, enjoining the Respondent from "in

²⁷ See *Lafayette Park Hotel*, supra at 826–827; *Flamingo Hilton-Laughlin*, supra at 288–289; and *Ark Las Vegas Restaurant*, supra at 1291.

²⁸ Lafayette Park Hotel, supra at 827.

²⁹ Id.

Member Walsh dissents from his colleagues' dismissal of the allegation pertaining to the off-the-job-conduct rule. He would find the violation based on *Cincinnati Suburban Press*, 289 NLRB 966, 966 fn. 2, 973–975 (1988) (finding unlawfully overbroad the employer's rule against, among other things, "unseeming conduct on or off Company premises or during non-working hours"). Member Walsh also agrees with the views expressed by Members Fox and Liebman in their partial dissent in *Lafayette Park Hotel*, supra at 832.

³¹ We will modify the judge's recommended Order to conform with that issued in Cintas Corp., 344 NLRB 943 fn. 4 (2005), and Guardsmark, LLC, 344 NLRB 809, 812 fn. 8 (2005). The Respondent may comply with our Order by rescinding the unlawful other badges rule and confidentiality rule provisions and republishing its company personnel policies sheet and retail store employee handbook without them. We recognize, however, that republishing the policies sheet and employee handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with policies sheet and employee handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the policies sheet and employee handbook without the unlawful provisions. Thereafter, any copies of the policies sheet and employee handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees.

any other manner" violating the Section 7 rights of employees, based on the Respondent's failure to adequately and/or timely respond to information requests involving stores in the Respondent's Rocky Mountain Division. A broad cease-and-desist order is warranted only when a respondent "is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Hickmott Foods, Inc., 242 NLRB 1357 (1979). In our view, the Respondent's failure to respond to the Unions' information requests that were routinely generated in the course of investigating and pursuing grievances, while unlawful and a persistent problem, does not manifest "egregious or widespread misconduct . . . demonstrat[ing] a general disregard for the employees' fundamental statutory rights." Therefore, the Respondent's misconduct does not meet the stringent Hickmott standard for a broad order. Accordingly, we consider a narrow cease-and-desist order—tailored to the Respondent's history of failing to respond to information requests at its Rocky Mountain Division facilities and enjoining the Respondent from committing any like or related 8(a)(5) information request violations in the future—is the appropriate remedy in the circumstances of this case.³²

The judge's recommended Order also provides for special remedies that impose a series of extraordinary and specific conduct requirements on the Respondent in order for it to meet its statutory obligations to furnish requested relevant information relating to its Rocky Mountain Division facilities. The judge found that these conduct requirements were appropriate given the Respondent's mishandling of many information requests and its failure to adhere to its statutory obligations under the Act. Contrary to the judge, there has been no showing that the Board's traditional remedies will not sufficiently ameliorate the effect of the information request violations committed by the Respondent. In our view, the Respondent's information request violations were not so numerous, pervasive, and outrageous that special or extraordinary remedies are needed to dissipate fully the coercive effects of these violations. We find that the special remedies directed by the judge are unwarranted and go beyond what is needed to fully rectify the unfair labor practices we find here. See First Legal Support Services, LLC, 342 NLRB 350 fn. 6 (2004). Accordingly, we enter a remedy as set out in the affirmative provisions of the Order below.³³

AMENDED CONCLUSIONS OF LAW

- 1. Substitute the following for Conclusion of Law 4(a)(3) in the judge's decision.
- "(3) Telling our employees that they may not discuss, support or solicit the support of other employees for the Unions when employees are off work, in nonwork areas or when they are allowed to discuss other nonbusiness matters among themselves."
- 2. Substitute the following for Conclusion of Law 4(a)(8) in the judge's decision.
- "(8) Maintaining an overly broad confidentiality rule that prohibits our employees from engaging in protected concerted activity."
- 3. Substitute the following for Conclusion of Law 4(c)(1)(iv) in the judge's decision.
- "(iv) Making false statements concerning relevant information requested by the Unions, and failing to provide such information to the Unions because we have destroyed it."
- 4. Delete Conclusions of Law 4(a)(7) and (c)(1)(v) in the judge's decision and renumber the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Albertson's, Inc., Boise, Idaho, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing or refusing to provide United Food and Commercial Workers Local Unions 7, 8, 44, 135, 368A, 394, and 1167 and International Brotherhood of Teamsters Local Union 537 (the Unions) with requested information that is necessary and relevant to their respective roles as the exclusive representatives of unit employees working at the Respondent's following facilities: store 211 in Great Falls, Montana; stores 416 and 488 in Bellingham, Washington; store 954 in Blythe, California; store 1631 in Vista, California; stores in southern Idaho and eastern Oregon, and retail stores and Denver distribution center in the Rocky Mountain Division.
- (b) Failing or refusing to provide timely responses to the Unions' requests for information that is necessary and relevant to the Unions' performance of their duties as the exclusive collective-bargaining representatives of

³² Member Walsh agrees with the judge, for the reasons he states, that the Respondent's numerous unfair labor practices and its coordinated unlawful response to the Unions warrant a broad cease-and-desist order against the Respondent's Rocky Mountain Division and the stores and other facilities it comprises.

³³ Member Walsh agrees with the judge, for the reasons he states, that the Respondent's "systematic, widespread" refusals to provide information warrant special remedies concerning the Respondent's obligation to comply with future information requests.

unit employees working at the facilities described above in paragraph 1(a).

- (c) Making false statements concerning relevant information requested by Local Union 7 and failing to provide such requested information to Local Union 7 because the Respondent has destroyed it.
- (d) Delaying or withholding furnishing requested relevant information to Local Union 7 because the Respondent disagreed with Local Union 7's pursuit of employee grievances.
- (e) Delaying furnishing requested relevant information by insisting that Local Union 8 obtain such information through dictation and hand copying of voluminous records at the Respondent's stores.
- (f) Instructing or suggesting to employees exactly what they should tell union agents about grievance matters, thereby interfering with Local Union 8's grievance investigation, and threatening employees with adverse action if they do not follow such instruction or suggestion.
- (g) Telling employees that we will bypass Local Union 8, their collective-bargaining representative, and deal directly with them to resolve their pay grievances.
- (h) Telling employees that they may not discuss, support or solicit the support of other employees for UFCW Local Union 555 when employees are off work, in non-work areas, or when they are allowed to discuss other nonbusiness matters among themselves.
- (i) Disciplining or warning, orally or in writing, an employee for engaging in protected concerted activity by providing employee names to assist Local Union 555's organizing campaign.
- (j) Telling employees that it was wrong for an employee to engage in protected concerted activity by providing employee names to assist Local Union 555's organizing campaign.
- (k) Unilaterally changing terms and conditions of employment of the Oregon store employees represented by Local Union 555 without giving Local Union 555 notice and an opportunity to bargain over those changes.
- (1) Dealing directly with employees and bypassing Local Union 555 by promising investigations and quicker resolutions of time-off-the-clock grievances if the employees furnish the Respondent with the information on this subject that they provide to Local Union 555.
- (m) Maintaining an overly broad other badges rule that prohibits the employees' right to wear badges and pins indicating support for a union, without the Respondent's approval.
- (n) Maintaining an overly broad confidentiality rule that prohibits the employees from engaging in protected concerted activity, e.g., providing employee names to assist a union's organizing campaign.

- (o) Announcing and enforcing a rule, which applies only to the union steward for the Respondent's represented employees, that union materials may not be posted on company bulletin boards.
- (p) Disciplining, warning, issuing a written warning to, or putting a written notice in an employee's personnel file indicating that the employee improperly posted union materials on the Respondent's bulletin boards.
- (q) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Provide, to the extent we have not already done so, the information that was requested by the Unions on various dates during the period opposite their names indicated below.

Local Union 7	March 17, 1994, through Feb-
	ruary 6, 1997
Local Union 8	December 28, 1995, June 19-
	21, 1996, July 9 and 18, 1996,
	and March 21, 1997
Local Union 44	September 26, 1997
Local Union 135	June 25 through December 10,
	1997
Local Union 368A	September 3 through December
	24, 1997
Local Union 394	August 8 through December 4,
	1996
Local Union 537	October 4, 1995, through April
	25, 1996
Local Union 1167	February 4 through September
	12, 1997

- (b) Offer to engage in good-faith bargaining with Local Unions 7, 135, 394, and 537 respecting alternatives means and methods for the disclosure of requested relevant confidential information before the Respondent may refuse to disclose such information to the Unions.
- (c) Within 14 days from the date of the Board's Order, remove from the Respondent's files any reference to the written warning of Mary Ford, including the March 20,
- 1998 memorandum, and, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.
- (d) Within 14 days from the date of the Board's Order, remove from the Respondent's files any reference to the written warning of Stewart Fishman, including the December 3, 1997 documented verbal warning, and within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used against him in any way.

- (e) Rescind and give no effect to the February 28, 1997 disciplinary policy providing for the automatic termination of employees who engage, for the first time, in alcohol and tobacco sales to minors as that policy applies to the Oregon store employees represented by Local Union 555.
- (f) Rescind the other badges rule for employees that requires company authorization for wearing union badges or pins by employees.
- (g) Rescind the confidentiality rule which subjects employees to immediate discharge if they disclose confidential information or engage in any other similar act constituting disregard for the Company's best interest.
- (h) Furnish all current employees with inserts for the company personnel policies sheet and retail store employee handbook that (1) advises employees that the unlawful other badges and confidentiality rules above have been rescinded; or (2) provide the language of lawful rules; or publish and distribute to all current employees a revised company personnel policies sheet and retail store employee handbook that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.
- (i) Within 14 days after service by the Region, post at the locations indicated below, copies of the attached notices marked "Appendixes A through J." Copies of the notices, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notices to all current employees and former employees employed at that location by the Respondent since March 1994.

Notices	Locations
A	Represented Rocky Mountain Division facilities
В	store 211 in Great Falls, Montana
C	store 589 in Redmond, Washington

³⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

D	Represented stores in Oregon
E	Nationwide
F	store 1631 in Vista, California
G	store 954 in Blythe, California
H	stores 416 and 488 in Bellingham, Wash-
	ington
I	store 559 in Beaverton, Oregon
J	Represented stores in southern Idaho and
	eastern Oregon

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

Post at all represented Rocky Mountain Division facilities

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide United Food and Commercial Workers Local Unions 7 and 394 and International Brotherhood of Teamsters Local Union 537 (the Unions) with requested information that is necessary and relevant to their respective roles as the exclusive representatives of unit employees working at our retail stores and Denver distribution center in the Rocky Mountain Division.

WE WILL NOT fail or refuse to provide timely responses to the Unions' requests for information that is necessary and relevant to the Unions' performance of their duties as the exclusive collective-bargaining representatives of unit employees working at our retail stores and Denver distribution center in our Rocky Mountain Division.

WE WILL NOT make false statements concerning relevant information requested by the Unions, and WE WILL NOT fail to provide such requested information to the Unions because we have destroyed it.

WE WILL NOT delay or withhold furnishing requested relevant information to the Unions because we disagree with their pursuit of employee grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide, to the extent we have not already done so, the information that was requested by Local Union 7 on various dates during the period March 17, 1994, through February 6, 1997.

WE WILL provide, to the extent we have not already done so, the information that was requested by Local Union 394 on various dates during the period August 8 through December 4, 1996.

WE WILL provide, to the extent we have not already done so, the information that was requested by Local Union 537 on various dates during the period October 4, 1995, through April 25, 1996.

WE WILL offer to engage in good-faith bargaining with the Unions respecting alternatives means and methods for the disclosure of requested relevant confidential information before we may refuse to disclose such information to the Unions.

ALBERTSON'S, INC.

APPENDIX B

Post at store 211 in Great Falls, Montana

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide United Food and Commercial Workers Local Union 8 (the Union) with requested information that is necessary and relevant to its role as the exclusive representative of unit employees working at our store 211 in Great Falls, Montana.

WE WILL NOT fail or refuse to provide timely responses to the Union's requests for information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of store 211 unit employees.

WE WILL NOT delay furnishing requested relevant information by insisting that the Union obtain such information through dictation and hand copying of voluminous records at our stores.

WE WILL NOT instruct or suggest to our employees exactly what they should tell union agents about grievance matters, thereby interfering with the Union's grievance investigation, and WE WILL NOT threaten our employees with adverse action if they do not follow such instruction or suggestion.

WE WILL NOT tell our employees that we will bypass the Union and deal directly with them to resolve their pay grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide, to the extent we have not already done so, the information that was requested by the Union on December 28, 1995, June 19–21, 1996, July 9 and 18, 1996, and March 21, 1997.

ALBERTSON'S, INC.

APPENDIX C

Post at store 589 in Redmond, Washington

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees that they may not discuss, support or solicit the support of other employees for United Food and Commercial Workers Local Union 555 (the Union) when employees are off work, in non-

work areas or when they are allowed to discuss other nonbusiness matters among themselves.

WE WILL NOT discipline or warn, orally or in writing, an employee for engaging in protected concerted activity by providing employee names to assist the Union's organizing campaign.

WE WILL NOT tell employees that it was wrong for an employee to engage in protected concerted activity by providing employee names to assist the Union's organizing campaign.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the written warning of Mary Ford, including the March 20, 1998 memorandum, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

ALBERTSON'S, INC.

APPENDIX D

Post at represented stores in Oregon

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change terms and conditions of employment of the Oregon store employees represented by United Food and Commercial Workers Local Union 555 without giving the Union notice and an opportunity to bargain over those changes.

WE WILL NOT deal directly with employees and bypass the Union by promising investigations and quicker resolutions of time-off-the-clock grievances if the employees furnish us with the information on this subject that they provide to the Union. WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately rescind and give no effect to our February 28, 1997 disciplinary policy providing for the automatic termination of employees who engage, for the first time, in alcohol and tobacco sales to minors as that policy applies to our Oregon store employees represented by the Union.

ALBERTSON'S, INC.

APPENDIX E

Nationwide posting

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an overly broad other badges rule that prohibits our employees' right to wear badges and pins indicating support for a union, without our approval.

WE WILL NOT maintain an overly broad confidentiality rule that prohibits our employees from engaging in protected concerted activity, e.g., providing employee names to assist a union's organizing campaign.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the language of the other badges rule for our employees, which is set forth in our company personnel policies sheet and retail store employee handbook, that requires company authorization for wearing badges or pins by employees.

WE WILL rescind the language of the confidentiality rule, which is set forth in our company personnel policies sheet and retail store employee handbook, that subjects our employees to immediate discharge if they disclose confidential information or engage in any other similar

act constituting disregard for the Company's best interest.

WE WILL furnish all of you with inserts for the company personnel policies sheet and retail store employee handbook that (1) advises you that the unlawful other badges and confidentiality rules above have been rescinded; or (2) provide the language of lawful rules; or publish and distribute to all of you a revised company personnel policies sheet and retail store employee handbook that (1) do not contain the unlawful rules, or (2) provide the language of the lawful rules.

ALBERTSON'S, INC.

APPENDIX F

Post at store 1631 In Vista, California

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide United Food and Commercial Workers Local Union 135 (the Union) with requested information that is necessary and relevant to its role as the exclusive representative of unit employees working at our store 1631 in Vista, California.

WE WILL NOT fail or refuse to provide timely responses to the Union's requests for information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of store 1631 unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide, to the extent we have not already done so, the information that was requested by the Union on various dates during the period June 25 through December 10, 1997.

WE WILL offer to engage in good-faith bargaining with the Union respecting alternatives means and methods for disclosure of requested relevant confidential information before we may refuse to disclose such information to the Union.

ALBERTSON'S, INC.

APPENDIX G

Post at store 954 in Blythe, California

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide United Food and Commercial Workers Local Union 1167 (the Union) with requested information that is necessary and relevant to its role as the exclusive representative of unit employees working at our store 954 in Blythe, California.

WE WILL NOT fail or refuse to provide timely responses to the Union's requests for information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of store 954 unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide, to the extent we have not already done so, the information that was requested by the Union on various dates during the period February 4 through September 12, 1997.

ALBERTSON'S, INC.

APPENDIX H

Post at stores 416 and 488 in Bellingham, Washington

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide United Food and Commercial Workers Local Union 44 (the Union) with requested information that is necessary and relevant to its role as the exclusive representative of unit employees working at our stores 416 and 488 in Bellingham, Washington.

WE WILL NOT fail or refuse to provide timely responses to the Union's requests for information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of stores 416 and 488 unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide, to the extent we have not already done so, the information that was requested by the Union on September 26, 1997.

ALBERTSON'S, INC.

APPENDIX I

Post at store 559 in Beaverton, Oregon

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT announce and enforce a rule, which applies only to the union steward for our represented employees, that union materials may not be posted on company bulletin boards.

WE WILL NOT discipline, warn, issue a written warning to, or put a written notice in an employee's personnel file indicating that the employee improperly posted union materials on our bulletin boards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the written warning to Stewart Fishman, including the December 3, 1997 documented verbal warning, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used against him in any way.

ALBERTSON'S, INC.

APPENDIX J

Post at all represented stores in southern Idaho and eastern Oregon

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide United Food and Commercial Workers Local Union 368A (the Union) with requested information that is necessary and relevant to its role as the exclusive representative of unit employees working at our stores in southern Idaho and eastern Oregon.

WE WILL NOT fail or refuse to provide timely responses to the Union's requests for information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of unit employees working at our stores in southern Idaho and eastern Oregon.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide, to the extent we have not already done so, the information that was requested by the Union on various dates during the period September 3 through December 24, 1997.

ALBERTSON'S, INC.

- Sheryl S. Josephson and Barbara D. Josserand, Esqs., for the General Counsel.
- W. Randolf Teslik, Richard Appel, and William Allen, Esqs. (Akin, Gump, Strauss, Hauer & Field, LLP), of Washington, D.C. and Peter M. Anderson, Esq. (Preston, Gates & Ellis), of Seattle, Washington, for the Respondent.
- John Bowen, Esq., of Denver, Colorado, for Charging Party Local 7.
- Gene Mechanic, Esq. (Goldberg, Mechanic, Tu, and Gibson), of Portland, Oregon, for Charging Party Local 555.
- Martin D. Buckley and Michael J. Belo, Esqs. (Berenbaum, Weinshienk & Eason, PC), of Denver, Colorado, for Charging Party Teamsters Local 537.
- David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for Locals 4 and 368A, United Food and Commercial Workers International Union and Local 119, Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO.
- Christyne L. Neff, Esq., Assistant General Counsel and Edward P. Wendel, Esq., General Counsel United Food and Commercial Workers International Union, of Washington, D.C. for the Charging Party International Union and various constituent Locals.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above-captioned consolidated cases in trial in Denver, Colorado, San Francisco, California, and Portland, Oregon, during the period October 1998 through May 2001. Posthearing briefs were submitted on October 19, 2001.

Based on charges filed, the amended consolidated complaint as further amended at the hearing² alleges that the Respondent in a variety of settings and circumstances violated Section 8(a)(5) and (1) of the Act by failing to satisfy its obligations to provide information to labor organizations necessary for them to fulfill their role as representatives of the Respondent's employees and by other acts and conduct. The complaint further alleges in various settings that the Respondent's agents violated Section 8(a)(1) and (3) of the Act and independently violated Section 8(a)(1) of the Act. Finally, the complaint alleges that the Respondent's violations and history of violations of the Act warrant certain extraordinary relief in addition to traditional remedies for the violations found. As a result of the trial rulings and additions and withdrawal of charges and complaint allegations, the complaint is no longer continuously numbered but rather has numerous deleted paragraphs and subparagraphs.

The Respondent denies that its conduct has violated the Act and advances various additional defenses including the prior settlement of several of the charges underlying certain allegations of the complaint. In addition, the Respondent opposes the General Counsel's prayer for relief as without support in fact or in law.

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

Upon the entire record³ herein, including helpful briefs on motions and issues during the trial and posthearing briefs from the General Counsel, various of the Charging Parties, and the Respondent, and from my observation of the witnesses and their demeanor, I make the following findings of fact.⁴

¹ The charges and amended charges are identified by docket number, date of filing, and identity of filer in App. I, infra. The Charging Parties whose full and correct names are set forth in App. I are referred to by Local number as, for example, the Charging Party Local 4 (Local 4). Local 119, Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL–CIO (Bakers Local 119 or the Charging Party Bakers Local 119)

The Charging Party United Food and Commercial Workers International Union (the Charging Party International or the International or the UFCW). The International Brotherhood of Teamsters, Local 537 (Local 537, the Charging Party Local 537, or Teamsters 537).

² The consolidated proceeding added charges and allegations by consolidation and amendment and separated charges and allegations by severance, withdrawal, settlement, and dismissal. Only current allegations and charges are referred to herein.

³ The Respondent's and the General Counsel's motions to correct the transcript are granted.

⁴ As a result of the pleadings and the stipulations of counsel during the course of the litigation, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

In various orders issued during the course of the trial, both in writing and from the bench, a host of motions were ruled on. Those rulings will not be discussed or reconsidered save as specifically discussed

I. JURISDICTION

The Respondent is a corporation engaged in the business of operating a chain of retail supermarkets with principal administrative offices in Boise, Idaho, and other places of business throughout the United States. During recent years the Respondent, in the course and conduct of its business operations, derived annual gross revenues in excess of \$500,000 and sold and shipped from its Colorado facilities, goods and materials valued in excess of \$50,000 directly to points outside the State of Colorado. During the same periods, the Respondent, in the course and conduct of its business operations, annually purchased and received, at its Colorado facilities, goods and materials valued in excess of \$50,000 directly from points outside the State of Colorado.

The parties do not dispute, and I find based on the above, that at all material times, Respondent has been and is now an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

There is no dispute and I find that at all material times, the United Food and Commercial Workers International Union and its affiliated Locals 4, 7, 8, 44, 81, 135, 324, 367, 368A, 373, 381, 394, 428, 555, 588, 770, 839, 870, 1036, 1105, 1167, 1179, 1288, 1428, 1439, and 1442 have each individually been labor organizations within the meaning of Section 2(5) of the Act.

There is no dispute and I find that at all material times, the International Brotherhood of Teamsters Local 537 has been and is now a labor organization within the meaning of Section 2(5) of the Act.

There is no dispute and I find that at all material times, the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 119, AFL—CIO has been and is now a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory Note on the Instant Decision's Organization and its Presentation, Consideration, and Resolution of the Alleged Unfair Labor Practices

The instant litigation evolved during its trial with cases and complaint allegations repeatedly added and others deleted. The alleged unfair labor practices arising out of the above-captioned cases now before me for resolution are numerous and involve multiple parties, settings and circumstances. Moreover, the entire case was very closely litigated throughout with multiple interlocutory motions, rulings, and appeals as well as collateral legal proceedings in the Federal court. These events and circumstances combined with the substantial length of the proceeding, the length of the record and the multiplicity of allegations and related issues have regrettably made the instant decision lengthy and unwieldy.

So, too, significant portions of the matters in controversy are influenced by resolution of certain other allegations that need to be considered with them. Thus, for example, the issue of prior settlement as a defense to various alleged violations involves consideration of events occurring after the alleged violations of the Act. The resolution of the entire body of unfair labor practice allegations, as well as individual allegations, must be considered in the context of the issues raised by the defense respecting information cases and allegations of pattern and practice conduct as well as allegations of design and intention raised in the remedy portion of the analysis.

I have found it is impossible to organize and present an intelligible decision in this matter which visits and as necessary revisits, all the issues raised at the hearing and, which are necessary to reach a decision in the case in the order of their actual consideration, turning from one allegation to another repetitively in each setting until a final conclusion is reached. Further, considerations regarding the length of this decision made it impossible in my view to incorporate herein a full discussion of the myriad arguments and rulings made in the hundreds of formally argued matters ruled on at trial, many of which were separately briefed and/or extensively orally argued and decided by written order—and in some cases appealed to the Board throughout the proceeding. Finally, I viewed it impractical to repeatedly address in the bulk of the allegations of the complaint various general arguments which by virtue of the existence of prior settlements, pattern and practice evidence and argument, or remedy factors bearing on them, required consideration of such evidence and arguments.

What follows, from my conclusion that a traditionally structured decision will not well serve the parties herein, is a decision that is, regrettably, more linearly structured than the analysis, consideration and conclusions it records and reflects. To an extent not proper in a decision less freighted with the difficulties described above, this decision frequently incorporates by reference arguments and rulings made during the hearing and necessarily refers to evidence discussed and issues and rulings made elsewhere in the decision. Decisions on individual issues and allegations are taken in the foreparts of the decision, which depend and rely on consideration and analysis set forth later in the decision. In a real sense the instant decision is organized and presented in a manner designed to be intelligible and coherent at the cost of not tracking the actual order and process of decisionmaking issue-by-issue and allegation-by-allegation.

Even if my approach to the organization of this decision has resulted in an ill-made work, I wish to emphasize that the arguments, evidence and relevant law on the various issues in the case requiring staged consideration and analysis have received that multiple or revisited consideration in fact in reaching the individual decisions contained herein. Even if the structure of this written decision—under the constraints of size and complexity discussed, supra—does not allow that process of multiple, or staged, or revisited consideration of issues in the context of the issues and arguments bearing upon it to be clearly revealed in the decision itself, that effort—the duty and obligation of the administrative law judge in reaching any decision—has been undertaken in this matter.

below. The rulings include the dismissal of complaint pars. 63(m), (o) respecting provision of a copy of the dress code, (x), 71, and 76.

B. Background

The Respondent is a major retail grocery chain with numerous retail stores and supporting warehousing and distribution facilities throughout the country. Its corporate headquarters and main administrative offices are located in Boise, Idaho. The instant consolidated matter deals with the Respondent during the broad, middle, and later years of the 1990s. During that period the Respondent through the opening of new stores and the acquisition of existing stores or store chains added substantially to its business. In about 1994, the Respondent had between 800 and 900 retail stores and 80,000 to 90,000 employees in about half the States. New stores and acquired stores—including a major merger and acquisition in mid-1999—boosted the Respondent's store complement to approximately 2500 and its employee compliment to 230,000 in 36 States.

The Respondent's retail stores and warehouse and distribution facilities are generally organized with employees represented by traditional labor organizations: warehouse and distribution facilities by locals of the International Brotherhood of Teamsters, stores or subunits of stores by locals of the United Food and Commercial Workers International Union and locals of the Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL—CIO. All the Charging Party Local Unions herein represent employees of the Respondent in stipulated bargaining units, which units are not under challenge.

The Respondent's operations are divided into Southern and Western Regions. The latter into divisions comprising Idaho (including eastern Oregon), Inland Empire (including Montana, eastern Washington, and Idaho panhandle), Western Washington, Oregon, Northern California, Southern California, Utah, Southwest (New Mexico, Arizona, and El Paso, Texas), and Rocky Mountain (including Colorado, Wyoming, and South Dakota) divisions. Each division has a management team generally comprised of vice president, sales managers, district managers, and merchandisers. Individual retail store directors report to division management.

The Respondent at relevant times maintained a labor relations department in Boise, Idaho, located in the corporate head-quarters building, which assisted management in the divisions, the stores, and distribution centers with labor relations issues. The labor relations professional staff comprises attorneys and nonattorney contract administrators. While not so termed in the record, a working unit or team was often an attorney and supporting contract administrator(s). Such a unit was assigned to and provided assistance to one or—depending on size and workload—more divisions. The labor relations department is supervised by the vice president of labor relations who in turn reports to the executive vice president of human resources—Boise-based corporate officers.

Respondent's retail stores are headed by store directors who report to divisional management. Store directors as well as divisional management may on their own initiative contact a staff member in the labor relations unit assigned to that division regarding labor relations matters. Labor relations department unit personnel may in turn deal directly with store managers and other divisional staff on relevant matters. Labor organization representatives in dealing with matters concerning represented stores have generally been instructed by the Respondent to deal with local management respecting certain matters and to deal with the appropriate labor relations unit or a given individual member of that unit respecting other matters or later stages of the processing of certain matters.

The labor organizations representing the Respondent's employees bargain for and enter into collective-bargaining agreements with the Respondent both directly and in some cases through multiemployer bargaining entities. This process on the Respondent's side—both respecting bargaining and in dealing with questions and information requests that arise—often involves labor relations unit personnel. Generally, the collective-bargaining agreements—the contracts—provide conventionally for the filing and processing of grievances and the arbitration of unresolved grievances and establish procedures for this process.

The agents of the labor organizations that represented employees of the Respondent during the period at issue had a large number of questions and concerns regarding representational matters, which they put to the Respondent. The labor organizations asked the Respondent's agents both at the store and distribution facility level and in other circumstances at the Boise labor relations level for information, documentary and otherwise. The agents of the Respondent thereafter responded or not and in whatever fashion they deemed appropriate. Information requests often involved a number of exchanges, written or otherwise, between the Respondent and the asking labor organization until the matter was resolved or crystallized into a difference.

C. An Overview of the Issues in the Case

The instant case is a consolidation of cases from many locations within the Western United States, all involving the Respondent's operations in its Western region. The allegations of the complaint may be separated into two gross categories: information allegations alleging that the Respondent in various settings and circumstances failed to properly respond to labor organization requests for information in violation of Section 8(a)(5) and (1) of the Act and, a second residual category of all the other allegations in the complaint which cases deal primarily with alleged violations of Section 8(a)(1) of the Act, but also include additional allegations of violations of Section 8(a)(3) and (5) of the Act. An important third area of dispute is the remedy that should be directed for violations found and, more specifically, whether or not the extraordinary remedies sought by the General Counsel are appropriate.

The latter or residual category of complaint allegations present important issues of fact regarding what actually occurred in a variety of situations as well as the application of relevant Board and court authority to each situation. The former category of information request allegations—by far the larger in

⁵ The Respondent's director of labor relations, Christopher Yost, testified that the percentage of employees represented by labor organizations increased from somewhat under to well over 50 percent during the latter half of the 1990's.

⁶ The complaint paragraphs alleging unit appropriateness and labor organization representative status, as amended following the stipulations of the parties, were not contested.

terms of the number of complaint allegations and issues—deals with a relatively narrow area of Board law as it applies to a wide variety of disputed factual settings. Thus, all the complaint allegations present issues of both fact and law. The information cases, however, while individual and setting specific, also involve broader contentions the resolution of which have implications and consequences for a significant number of individual complaint allegations.

The Respondent argues⁷ that the Charging Parties caused or at least contributed significantly to the Respondent's difficulties in responding to certain of the information requests at issue herein by suddenly so increasing the volume of information requests filed with the Respondent that its labor relations department staff was overwhelmed—swamped—by the time and resource demands of the union information requests and in consequence could not in all cases provide information as quickly as it would have liked and as would have been the case had the labor organizations not undertaken to cause such delays. The Respondent argues that such "swamping" by the Charging Parties is a defense to the information request violations alleged.

The Respondent further argues that various of the charges underlying the violations alleged in the complaint were settled by the Respondent and the Charging Party Unions involved. In two cases, the Respondent and the Board's Regional Offices entered into settlement agreements that have been set aside by formal order issued with the complaint herein. The Respondent argues that these two settlement agreements were improvidently set aside and urges me to reinstate them. In several other cases the parties reached agreements that included the relevant Charging Party moving the Board's relevant Regional Director to approve a request to withdraw the unfair labor practice charges. The Board's Regional Directors in these cases did not approve the Charging Parties' withdrawal requests or settlements, which remain outstanding. The Respondent urges that I approve them.

The General Counsel and the Charging Parties argue the Respondent, throughout the relevant period and historically, has been a recidivist employer or scofflaw whose agents developed a strategy or common course of conduct designed to undermine the labor organizations that represent its employees. That course of conduct involves utilizing its Boise-based labor relations department and its centralized control of labor relations to

systematically deny or unreasonably delay the Respondent's replies to labor organization requests for information, by simply ignoring the requests, by making the information sought difficult to obtain, by falsely misunderstanding or questioning the meaning or propriety of the information requests, and by giving false or misleading information in reply to the requests. This course of conduct, argue the General Counsel and the Charging Parties, was malignly designed and intended to raise the labor organizations' costs of representing the employees, reduce and diminish their quality of union representation, and undermine employee support for the Charging Parties and employee representation generally. The Government argues that this course of conduct and recidivism justifies the imposition of an extraordinary remedy for the violations found.

D. The Information Cases

The information case section of this decision initially deals with the Respondent's "swamping defense" which applied to many of the information allegations. Thereafter, the individual information allegations of the complaint are addressed.

1. The swamping defense

a. The Respondent's arguments

The Respondent argues that there was a very significant increase in information requests and other grievance-arbitration activity in the 1994–1996 period, primarily generated by Local 7 and Teamsters Local 537 with additional requests filed by Local 8 on behalf of a single store with other increases by the other locals involved herein. Various counsel and contract administrators from the Respondent's labor relations department testified to the increase in the volume and complexity of the information request caseload as well as associated work such as unfair labor practice charges.

Addressing the Rocky Mountain division, which included Local 7 and Teamsters Local 537, the Respondent notes that there was a backlog of over 1200 grievance cases pending when Attorney Yost replaced Attorney Schwarzkopf in March 1995 and that grievances were coming in at a rapid rate. Contract Administrator Kathryn Bush testified that the backlog and the influx of work simply overloaded the department's ability to do the work.

The workload generated by this unanticipated activity, the Respondent argues, overwhelmed its labor relations department staff—particularly the staff dealing with the Rocky Mountain division that suffered from illness and staff turnover during training. Its staff could not be quickly increased due to the long—the better part of a year testified Yost, 8 to 9 months testified Bush—training period for attorneys and contract administrators. Further, since all the divisions experienced work increases, it was not possible to simply transfer staff from one team to another to cope with increased work.

The Respondent argues that the sudden and extraordinary load placed on its staff was dramatic, unanticipated, and ex-

⁷ The Respondent also argued that the bad faith of the Charging Parties in engaging in such a course of conduct rendered the information requests themselves outside the reach of the Act and/or constituted a factor highly relevant to the finding of a violation as to any particular information request allegation. The matter was extensively argued and briefed during the trial and was the subject of numerous rulings including both bench rulings and written orders. The record is complete respecting these issues and will not be recapitulated here save to summarize that the Respondent was not allowed to litigate the subjective good or bad faith of the information request filers if the government had sustained its burden of showing that at least one legitimate reason existed for the filing of each request. The General Counsel having met that burden respecting the information requests at issue, the Respondent was precluded from attempting to adduce evidence of the filer's bad faith.

⁸ Using the Respondent's methodology, which was disputed by the General Counsel and the Charging Parties, information requests for the Western division were filed in the following numbers: 1994—114, 1995—354, 1996—742 with a steady decline thereafter.

plains and excuses or largely mitigates many of the instances in which the Respondent is alleged to have violated Section 8(a)(5) and (1) of the Act in delaying information responses. Further, it is a critical factor to be taken into account in considering the extraordinary remedies sought by the Government.

b. The General Counsel and the Charging Parties' response

The General Counsel and the Charging Parties disputed the Respondent's means and methodologies for calculating the increase in information request filings suggesting through their own experts that the degree of increase was less than suggested by the Respondent's evidence. Further, they argue that the increase such as existed may not be considered as artificial or in some way entitled to discounted statutory protection. They note that the large backlog of grievances pending arbitration was the subject of bitter dispute between the Respondent and Local 7, which initiated a lawsuit to compel the Respondent to proceed to arbitration in the backlogged cases.

Further they note that the Respondent's agents did not complain of overwork during the process itself. This defense is an after-the-fact manufactured defense of the Respondent initiated in and for the instant case. Examination of the cases shows, they argue, that the Respondent's agents did not simply delay in providing information, rather they wrote letters to the Union ignoring the union requests and regularly interposed spurious objections and other improper impediments to disclosure. Thus, rather than the late or delayed conduct of overworked agents, their behavior was actively obstructionist and even labor intensive involving a range of actions by labor relations staff designed to obstruct the unions rather than to fulfill their requests.

Counsel for the Teamsters points out that labor relations department staff member Newell, the primary agent of the Respondent in dealing with the Teamsters' information cases, did not contend that any of the delays in responding to the Teamsters were attributable to increased workload either to the Teamsters during the events or in the instant case.

c. Analysis and conclusions

The record respecting the "swamping defense" of the Respondent is substantial and was augmented by the litigation of other issues such as the Government's requested remedy. The defense has a general wide reaching aspect as well as specific application to individual allegations. Where additional analysis is appropriate for a given complaint allegation, it is considered as part of the specific discussion of the allegation below. Considering the general defense as described above, based on the record as a whole and the able arguments of the parties, I reject the defense on factual grounds. Thus, I find it ineffective to diminish the responsibility of the Respondent for its conduct herein as discussed in detail in the portion of this decision dealing with the individual allegations below.

I reach this conclusion for a number of reasons. First, I find that, irrespective of the Respondent's desire to establish that there was a campaign by the Internationals and their Locals to discomfort the Respondent through the use of information requests and the grievance and arbitration system, each of the information requests which are the subject of the complaint were legitimate requests which enjoyed the protection of the

Act. Thus, I find that even if the International and its constituent locals in fact filed more information requests and grievances and took more cases to arbitration, each of the information cases involved herein enjoys the full statutory protection of any other information request. There is no discount of the Act's protections on this record.

My ruling that the Unions' information requests were fully covered by the Act did and does not preclude consideration of the Respondent's arguments that as a matter of practical workload consideration: it was unable to respond more timely to the flock of information requests. This argument bears on the question of whether or not the Respondent's response to the requests were reasonable under all the circumstances. I have considered the swamping argument and the supporting evidence in the context of the entire record and specifically reject this factual element of the Respondent's argument for several reasons.

First, in examining the manner in which the Respondent handled the specific information requests in question, I do not find examples of agents of the Respondent trying to supply information to the unions but being unable to do so because of the press of business. Rather, on occasion after occasion as is set forth below, the Respondent's labor relations department staff was simply obdurate and nonresponsive to information requests rather than simply delayed in responding to them. Thus, as is set forth below under consideration of each allegation, time after time the Respondent's agents handling information requests wrote letters to the Unions about the grievances without ever even acknowledging the information request. Elaborate and attenuated complaints and quibbles were put in writing by the Respondent's agents in letters to the union agents involved in information requests. Substantial professional staff time went into actions dedicated to delaying or refusing to supply information.

Importantly, in the communications of the Respondent's agents to the union agents about information requests, few situations arose in which the Respondent's agent indicated a willingness to supply information, but further indicated that the information would be delayed due to the press of the Respondent's business.¹⁰ In many cases information was simply not supplied or was specifically refused. It was typical for the Respondent to respond to a grievance without ever even acknowl-

⁹ The General Counsel and the Charging Parties strenuously contested the Respondent's assertions in these regards. Thus, they assert that the filings of the labor organizations were a result of the increased misconduct of the Respondent. I find that it is unnecessary to resolve the basic disagreement under the cases. I have found that with respect to each information request on this record, at least one valid basis for making the request was established by the Government. Therefore, the Act applies. Having made that finding in each case, I precluded evidence of other argued subjective union motivation because under the cases the other motivations are irrelevant. I shall therefore make no further findings respecting them.

The record does contain several statements by the Respondent's labor relations staff in their communications to the Unions during the events and in testimony in this proceeding that certain information request responses were going to be delayed because the agents of Respondent who were necessarily involved had more important things to do first.

edging the information requests that were filed with the grievance. In many other cases, the delays in providing information were longer than could reasonably be explained by simple press of business delays. ¹¹ Generally, I find the delays that occurred in providing information—contrary to the testimony of the Respondent's agents in some cases, were the result of systematic obfuscation.

On many occasions, the agents of the Respondent went to great lengths to make obtaining the information requested hard for the Union. In one instance, a request for certain documents was made by the Union and the agent of the Respondent discovered that no such documents existed. Were the press of business overwhelming, one might image that this matter would be quickly resolved by the Respondent. Yet the labor relations department agent wrote not one, but two, letters to the union agent asking that he telephone the Respondent about the matter without ever mentioning that the information did not exist and despite the fact that the agent testified to her general dissatisfaction with telephonic communication with the union agent. Many other exchanges of correspondence as set forth in detail below equally show a willingness of the Respondent's agents to put substantial time and resources into complicating and objecting to aspects of the requests—often found to be improper and inadequate objections, infra. I cannot credit an argument that there was a shortage of time and resources when the Respondent could and did dedicate such time and effort to obfuscation and complication rather than compliance with the requests at issue

It is clear that the Respondent's labor relation's staff worked long and hard. It is also clear that at least some of the staff felt that the labor organizations were making life hard for them with the increased load of information requests. But I find that the agents did not answer this increased workload with good faith efforts burdened with the delay caused by the press of business. Rather, the examples described above and others as set forth below convince me that the Respondent's agents believed the Unions were using the information requests as a form of pressure on the Respondent, begrudged the requests in consequence and were determined not to give in to the perceived pressure. I further find that the Respondent's agents in many cases, as set forth below, translated this hostility into improper and illegal delays and refusals to provide the requested information. As a result, again as set forth in the consideration of the individual allegations below, the conduct of the Respondent's agents was often in violation of the Act.

I also reject the Respondent's argument that the labor relations department and the team serving the Rocky Mountain division in particular could not be increased or augmented in order to meet the workload increases. The periods of time involved herein are measured in years not weeks or months and the Respondent is a corporation of size with significant resources. Even taking the Respondent witnesses' estimates of the time necessary to bring a new staff attorney or contract administrator staff up to speed, organizational changes could have been affected. Information requests—as this record and the testimony of the Respondent's labor relations staff repeatedly demonstrated—involve the identification and collection of documents precedent to vetting and disclosure. Clerical or administrative assistance in the identification, gathering, vetting, and reproduction of requested information could have been put in place with speed and without compromising the final review and disclosure decisions of staff attorneys and contract administrators. There is no record evidence that this or any other type of organizational reapproach took place.

The Respondent was not of course obligated by the Act to take any particular action respecting staffing, nor was it required to have its agents act in any particular manner such as being less obstructionist or labor intensive in disputing matters with the Unions. But even though the Respondent was not obligated to add to, better organize, structure or utilize its resources in any particular manner, its utilization of its resources and its ability to timely respond to the information requests at issue here is an important factor to consider in determining whether or not it was "swamped" by the press of business and must be forgiven the resulting delays in providing information. Having considered all the evidence on the issue, I find and conclude that the Respondent was not in any objective or reasonable way so overworked at relevant times by events out of its control that its failure through overwork is a relevant factor in consideration of its conduct in resolving the complaint allegations discussed below.

2. UFCW Locals

a. Local 8

The Respondent operated at all times material a retail store in Great Falls, Montana, which has been represented by Charging Party Local 8. During this period the Great Falls store was the only facility of the Respondent represented by Local 8. The store director was Robert (Bob) Agostinelli. Tom Crane was the president of Local 8. The store resided in the Respondent's Inland Empire division which division, as well as the Utah and Idaho divisions, was served by the Respondent's labor relations department, Unit Attorney Mark DeMeester, and Contract Administrator Sarah Shin. The parties had a collective-bargaining agreement extending from October 30, 1994, through April 11, 1999.

(1) Complaint paragraphs 57 and 89

Complaint paragraph 57 alleges:

- (a) Since about December 28, 1995, UFCW 8, in writing, requested that Respondent provide the following information:
- (i) Ms. (Gretta) Vestman's job classification and effective date of each job classification change from January 1, 1995, to December 28, 1995;
- (ii) Ms. Vestman's rate of pay for each of the above job classifications:
- (iii) the reasons for each job classification change and rate of pay change.

¹¹ Further the Respondent did not successfully demonstrate that other work of the labor relations department was significantly delayed by this swamping effect. I do not credit the general testimony of the Respondent's witnesses respecting their overwork in this regard, although I have no doubt that the Respondent's labor relations department's professional staff regularly worked long hours.

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- (b) The information requested by UFCW 8 as set forth above in paragraph 57(a) is necessary for, and relevant to, the UFCW 8's performance of its duties as the exclusive collective-bargaining representative of the Great Falls clerks unit described above in paragraph 16 and is a mandatory subject for the purposes of collective bargaining.
- (c) Since about December 28, 1995, and for an unreasonable time thereafter, Respondent by its agents, including Mark DeMeester, has delayed, failed, and refused to furnish UFCW 8 with the information requested by it as described above in paragraph 57(a).

Complaint paragraph 89 alleges in part:

(a) In disposition of Case 27–CA–15677–4 (formerly Case 19–CA–24390), Respondent entered into a unilateral informal settlement agreement which was approved on August 9, 1996.

. . . .

- (c) Subsequently, and by the acts set forth in this Third Amended Order Consolidating Cases, Order Setting Aside Settlement Agreements and Consolidated Complaint, Respondent has refused to comply with the settlement agreements described above in paragraph 89(a)....
- (d) Accordingly the undersigned, ORDERS, pursuant to Section 101.9(e)(2) of the Board's Rules and Regulations and Statements of procedure, that the settlement agreements described above . . . are vacated and set aside.

(a) Facts relevant to the settlement agreement reinstatement issue

Gretta Vestman was an employee of the Great Falls store. She was a represented salad bar and floral employee and along with other similarly classified employees had been the subject of an earlier arbitration respecting the appropriate contractual classification and concomitant wage rate they should receive. On December 28, 1995, Crane wrote 12 DeMeester indicating he wished to determine if Vestman was being paid in accordance with the contract and requested:

- (i) Ms. Vestman's job classification and effective date of each job classification change from January 1, 1995, to December 28, 1995,
- (ii) Ms. Vestman's rate of pay for each of the above job classifications,
- (iii) [T]he reasons for each job classification change and rate of pay change.

Local 8 filed a charge with the Board on February 27, 1996, (originally Case 19–CA–24390 now renumbered as Case 27–CA–15677–4) alleging that the Respondent's failure to respond to this information request violated Section 8(a)(5) and (1) of

the Act. Region 19 of the Board issued a complaint on the charge on April 24, 1996. The Respondent and the Board entered into a unilateral settlement of the allegations on July 26, 1996, which provided, inter alia, that the Respondent would "not refuse to provide or unreasonably delay providing relevant requested information" to Local 8. The settlement also provided:

SCOPE OF THE AGREEMENT—This Agreement settles only the allegations of the above captioned case, and does not constitute a settlement of any other case(s) or matters including but not limited to Cases 19–CA–22312, 23589, 24089, 24231, 24232, 24535, 24631, 24648 and 24663.

The Respondent sent the information at issue to the Union on July 30, 1996.

By its terms the settlement agreement became final when the time for appeal had lapsed without an appeal having been filed. The Board by letter dated August 29, 1996, notified the Respondent that an appeal had not been filed. In due course the notice posting required by the settlement was initiated and compliance with the affirmative terms of the settlement concluded without apparent complaint or challenge from any party. There is no evidence that the Region ever closed the case pursuant to the settlement and the General Counsel asserts the case remained open. The Charging Party agents testified that the Charging Party had never been informed that the settlement had been complied with or that the case was closed.

(b) Initial analysis and conclusions respecting the settlement agreement

The Respondent and the Regional Office entered into a unilateral settlement agreement, which, in the absence of appeal by the Charging Party to the Office of the General Counsel, became effective on or about August 29, 1996. In due course the Respondent provided information to the Union and posted the notice provided by the settlement. In the normal course, involving 60-day notice posting and administrative consideration of the fact of compliance, a settlement agreement that has been complied with and is not under challenge by the Charging Party respecting compliance, is normally closed by the Regional Office involved some brief period after the posting ends. Thus, given that compliance with the explicit affirmative terms of the settlement were apparently achieved in the normal course, Board Regional action closing the case might have been expected in early or mid-November 1996. In any event however, apparently nothing was done by the Regional Office or other Board office at that time and nothing was communicated respecting the closing of the case by and between any of the parties for a substantial period at which time the parties were informed that the settlement was not regarded as dispositive by the Region.

A Board settlement agreement is a complete disposition of the charges and allegations involved in the settlement. Unless a settlement agreement is set aside, the charges and allegations may not be the subject of further proceedings against the Respondent. A settlement agreement may only be set aside for either failure to perform or comply with the terms of the settlement agreement or for a breach of the settlement agreement.

¹² The correspondence of the parties respecting the matters in controversy herein represents a significant part of the evidence. Many of the letters involved were sent by both United States Postal Service mail and by facsimile transmission. In order to avoid burdening the record, unless otherwise relevant only the dates on the correspondence are given. Only where a document was not sent by facsimile transmission and the date of receipt of the document is independently relevant to the inquiry, will the date of receipt be separately be noted.

Procedurally the Regional Director on behalf of the General Counsel sets aside the settlement and proceeds to complaint with the underlying charge and allegations. The setting aside of the settlement is subject to review by the judge and the Board in the trial on the complaint. Unless and until the Regional Director's action in setting aside the settlement agreement is sustained, the merits of the allegations underlying the settled matters may not be found to violate the Act.

The court reviewed these procedures in *YMCA of the Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442, 1449–1450 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991), enfg. 291 NLRB 998, 1010, 1012 (1988):

A settlement agreement is binding on all parties to it, but it "will be set aside if its provisions are breached or if post-settlement unfair labor practices are committed" [citing Lawyers Publishing Co., 273 NLRB 129,129, 135 (1984), revd. in part and remanded 793 F.2d 1062 (9th Cir. 1986) and Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1109 (1st Cir. 1981)]. If the settlement agreement is set aside, the employer's presettlement conduct may be assessed for unfair labor practices. Moreover ... to determine whether postsettlement conduct may be considered as background evidence in determining the motive or object underlying a respondent's postsettlement conduct" [citing Lawyers Publishing, supra, 273 NLRB at 130 fn. 4, and other cases].

In considering the conduct offered to support the Regional Director's decision to set aside the settlement agreement herein, it is important to identify the time period and the geographical or organizational areas relevant to the settlement agreement. Conduct offered to set aside the settlement must occur after the effective date of the settlement agreement. *K & W Electric, Inc.*, 327 NLRB 70, 70 (1998). That date for this settlement agreement is August 29, 1996.

There are in essence three geographic/organizational units of the Respondent that must be considered in evaluating the General Counsel's arguments: the individual store which was the locus of the settlement agreement, the division the store falls within in the Western Region—here the Inland Empire Division, and the Respondent's Western Region as a whole. The store is the conventional area of consideration where the settlement agreement involves but a single store. Additionally in this case, however, the General Counsel has made very broad allegations attempting to establish a pattern or course of conduct of the Respondent in a larger organizational unit.

Turning to the store, there are no additional allegations of misconduct occurring at the Great Falls store (store #211) save for the unfair labor practices allegations of violations of Section 8(a)(5) in complaint paragraphs 59, 60, and 62 and the allegations of violations of Section 8(a)(1) of the Act alleged in subparagraphs 5(b), (c), and (e). As found infra, I sustained portions of complaint paragraph 59 finding the Respondent violated the Act by failing to properly respond to an information request during a period extending to September 6, 1996. I further sustained complaint paragraph 62 respecting similar conduct extending to June 1997.

Based on these findings, I further find that the Respondent engaged in subsequent unfair labor practices at the Great Falls store that were like and related to the conduct and allegations that underlie the settled case. I further find therefore that the Respondent breached the settlement agreement. Accordingly, I find the Regional Director properly set the settlement aside and I refuse to reinstate it. It is appropriate then to return to a consideration of the allegations of paragraph 57 of the complaint for a determination of their merits.

(c) Additional facts

The Union made the information request described above on December 28, 1995. Not receiving a response, the Union sent a followup letter on January 18, 1996, and, again in the absence of a response from the Respondent, a third letter renewing the request on January 30, 1996. The Union on February 27, 1996, filed a charge with the Board.

On March 21, 1996, DeMeester wrote Crane asserting:

As I mentioned in my letter dated October 27, 1995, Vestman is and has been classified as a helper clerk her rate of pay should have been at least the rate set forth for helper clerks in the Great Falls Clerks agreement.

On April 24, 1996, the Regional Director issued a complaint in the matter. The Respondent finally provided the information on July 30, 1996, in conjunction with the settlement described above.

The Respondent argues that Vestman as well as others were part of a long-term dispute between the Union and the Respondent respecting designation of floral and salad bar employees as helper clerks or all-purpose clerks. The Union well knew the Respondent's position—and had received reiterations of the position as recently as a letter from DeMeester dated October 27, 1995, that Vestman, among others, would be classified as a helper clerk. Thus the letter states, in part:

Since February 18,1993 [certain employees] have been paid rates higher than helper clerk rates, and accordingly they need not be paid any additional wages. Vestman likewise has received more wages that she would have, had she been classified as a helper clerk.

Further the Respondent argues and DeMeester's letter of October 27, 1995, also asserts, it had been and remained the Respondent's position that the Respondent had a right under the contract to pay employees, including Vestman, the helper clerk contract wage rate or a higher amount and had the right to shift rates for such employees without the consent of the Union.

The Respondent argues that its outside counsel, Nancy Cory, by letter dated December 5, 1995, had provided union counsel with accrued hours reports for the period January 1994 through September 1995, and indicated she was seeking to obtain the payroll records for October and November 1995. Thus, the Respondent argues, the Respondent:

[H]ad provided Crane with accrued hours reports, which provided the actual wage rates of Vestman and other bargaining unit employees. [Record citations omitted.] The foregoing provided answers to Crane's December 28, 1995, information

requests even before the request was made. (Respondent's posthearing brief, complaint pars. 57, at 9.)

Finally, the Respondent points out that in the second arbitration respecting the by then venerable dispute, the Respondent through both its store director and counsel made it clear that Vestman was a helper clerk. The Respondent also advances the testimony of DeMeester that he provided all the information requested by Crane to the investigating Board agent on April 1, 1996, and wrote a confirming letter to her dated April 8, 1996, in which he asserts to the Board agent: "If Crane has questions about the rate of pay that Vestman has received, he can obtain information at the store after notifying the Store Director, per [portions of the contract]." DeMeester testified that he did not supply the information to the Union he had given the Board agent on April 1, 1996, nor provide Crane a copy of the letter he sent the Board dated April 8, 1996, because he believed the Board would pass the information along to the Union.

The General Counsel takes issue at length with the accuracy, completeness and understandability of the materials submitted to union counsel by the Respondent's outside counsel on December 5, 1995, and points out that no records of any kind were provided for the period after September 1995. She also argues that the Respondent's general assertion that it could and did move Vestman's wage rates up and down is not a disclosure of the specifics of that wage activity which specifics were a critical part of the information request. Finally, the Charging Party and the General Counsel challenge the veracity of DeMeester's assertion from an experienced counsel that he did not copy the Union with a critical document because he thought the Government would disclose the information and supply the documents submitted to it by the Respondent to the Charging Party.

It is clear the Union was entitled to the information it sought. Represented employees' wages and hours are at the heart of the representative process. An employer's reasons for changing an employee's wages are equally part of the representative process. I reject the Respondent's argument that the information was in Crane's hands at the time he requested it. The information sent to the Union's counsel in early December was the subject of various disputes and did not fully encompass the Union's period of investigation and desired information. Simply telling the Union that the Respondent could and would change Vestman's wages as it chose is not a sufficient response to the more specific information request the Union had made. Further, even had the Union had more of the information that the record indicates—it was given to union counsel and was incomplete. The Respondent had an obligation to refer to the parts of its earlier communications if it intended to rely on them where, as here, it was none to obvious just what information had been supplied earlier. Lastly, and without determining if counsel DeMeester was truthful when he said he assumed the government would pass on information given and documents submitted to the Union, I find it was not reasonable to hold such a belief. Since the Government did not in fact pass on either the information or the documents, the Respondent may find no valid defense in what it gave the Board, but did not give the Union.

Based upon all the above and the record as a whole, I find the Respondent violated Section 8(a)(5) of the Act when it did not reasonably and timely respond to the Union's information request until July 1996.

(2) Complaint paragraph 59

Complaint paragraph 59 alleges:

- (a) Since about May 31, 1996, UFCW 8, in writing, requested Respondent to furnish UFCW 8 with the following information relating to a grievance filed at Respondent's Great Falls, Montana Store:
- (i) Payroll records clearly showing weekly hours worked for all bargaining unit individuals for the week ending July 16, 1994 to the date of the request;
- (ii) Information related to the classification of "jobber" and other job classifications, including job classifications for those individuals who were paid less than the contractual wage rate.
- (b) Since about June 20, 1996, UFCW 8, in writing, requested Respondent to furnish UFCW 8 with payroll history forms from September 2, 1994 to the date of the request.
- (c) The information requested by UFCW 8 as described above in paragraphs 59(a) and (b) is necessary for, and relevant to, UFCW 8's performance of its duties as the exclusive collective-bargaining representative of the Great Falls Clerks Unit described above in paragraph 16 and is a mandatory subject for the purposes of collective bargaining.
- (d) Since June 20, 1996, and for an unreasonable time thereafter, Respondent through its agents, including Sarah Shin has delayed, failed and refused to furnish UFCW 8 with the information requested by it as described above in paragraphs 59(a) and (b).

(a) Facts

The information requests at issue arose out of a longdeveloping dispute between the parties having its origins in the disputed unit inclusion of the salad bar and floral employees under the contract. The contract did not provide a wage for a salad bar and floral employee classification. The issue was arbitrated with an initial decision issuing in August 1994. In that decision the arbitrator held the salad bar and floral employees were part of the unit, but that they could be assigned as either helper clerks or as all-purpose clerks—contractually established positions with set wage rates. Thereafter the parties disagreed respecting whether the salad bar and floral employees should be classified as all-purpose clerks or as helper clerks or at in new position to be negotiated. The Union sought classification of the employees in the higher paid all-purpose clerk position and opposed the negotiation of a new position. The Respondent sought to negotiate a new position but, failing that, indicated it would classify the employees as lesser paid helper

The Union took the position that the classification of the salad bar and floral employees as helper clerks would increase the total hours worked of helper clerks at the store above a contractual established ceiling of 23 percent. The Respondent

did not agree. This dispute became the subject of a grievance filed on August 16, 1994, and was the subject of disputes respecting the Respondent's provision of requested information regarding it to the Local, the form of the information provided, and the cost charged by the Respondent to the Local of copying information. On April 5, 1996, the Union filed and subsequently withdrew an unfair labor practice charge against the Respondent regarding these issues. The Respondent provided certain information on May 24, 1996. On that date, Contract Administrator Shin, by letter suggested, inter alia, to Crane, as she had in an earlier letter dated May 13, that wage matters should be discussed with the store director.

On May 31, 1996, President Crane delivered to the Great Falls Store Director Agostinelli a letter seeking information in aid of the Union's helper clerk grievance including:

- [P]ayroll records showing weekly hours worked for unit employees for weeks ending July 16, 1994 to May 31, 1996.
- [T]he Great Falls Grocery classification under which persons reporting as "jobbers" or "grocery jobbers" are paid,
- [T]he Great Falls Grocery classification under which persons reporting as "grocer clerk", "receiving clerk", "produce arranger", "salad maker", "produce jobber", "floral arranger jobber", "customer service supervisor", "front end clerk", "courtesy jobber", "stock", "produce jobber", "produce helper", "produce clerk", "salad maker", "salad maker jobber", "helper", or "front end clerk".

The letter further sought information respecting "job code 40" or "administrative" employees previously reported to the Union. The letter asked if these employees were bargaining unit employees or not and, if so, their classification in accordance with the agreement. Finally the letter asserted:

As to the fact that some persons reported by Albertson's to be bargaining unit employees were paid less than the contractually mandated rates of pay, what is the Labor Agreements job classification for each of these persons? The names of the individuals affected, rates of pay reported by Albertson's for those individuals and the pay periods involved were reported to Ms. Cory, counsel for Albertson's, via a copy of my February 5, 1996, [letter]. A copy of that letter is enclosed for your information.

All the information was requested in connection with the helper clerks' ratio grievance, the letter added:

We are demanding full, complete and accurate information. Nothing less is acceptable. Therefore please be prepared to provide all copies of the requested information in writing and have available copies of the requested documents to be sold to me at a reasonable charge. In the alternative, the Union is prepared to scan the requested materials into its own computer using its own equipment which would represent minimal, if any cost to Albertson's or to the Union.

The letter sought a meeting and provided alternative dates.

The Respondent's outside counsel, Nancy Cory, responded by letter dated June 5, 1996, proposing a date for meeting. The letter also stated:

Also, be advised that Albertson's documents may not be taken from the store. A photocopier is available on the premises at a cost of 20 cents per page. If the services of an hourly employee are required in order [sic] the copying process, we will expect reimbursement at the hourly rate of that employee.

A meeting was held at the store on June 18, 1996, attended by Crane and Agostinelli, and, initially Cory and counsel for the Union, Patrick McKittrick. Crane was informed that he would not receive a written response that day and that the pay data would have to come directly from Boise. The Respondent's agents proffered duplicate timecard reports that indicate time in and time out as well as job code and store department, but not rate of pay. Crane replied that he wanted the Respondent's payroll history reports but "under protest" said he would take what he could get. Counsel for each side left and Crane and Agostinelli struggled with the copying of the records. The duplicate time reports were voluminous and difficult to copy and the process exhausted the time available without being more than partially completed. The Respondent did not charge the Union for the use of its copier.

Agostinelli did not recall with specificity, but testified that he gave the Union all the job code information he had. Crane's notes suggest he received answers linking job codes to contract pay rate classifications for all but two job codes for "stock."

By letter dated June 20, 1996, Crane wrote Shin seeking payroll history reports. On the same day he wrote a letter to Cory raising certain questions respecting payroll, complaining that the cost and inefficiency of using and copying the duplicate timecards when the Union sought the payroll history documents, and requesting payroll history reports for all store unit members for the period September 3, 1994, to June 20, 1996.

On June 25, 1996, Cory wrote to McKittrick responding to Crane's letter of June 20. The letter answered various questions raised by Crane respecting payroll data. She added:

Mr. Crane repeatedly requests in his correspondence a payroll history form. That document in that form does not exist beyond the time period for which you already have that document. All calculations made in relations to the contractually agreed upon percentage are and were made from the time record maintained at the store and which we have made available for your photocopying.

I sent to you early last week, a document to be signed by Mr. Crane covering the photocopying and costs of an employee for photocopying purposes. To date, I haven't received that document back or any response to that document by way of a complaint or otherwise. Again, please be advised that we request that document be signed prior to the photocopying process being resumed.

The Union did not reply to this letter. Rather, on July 8, 1996, the Union filed Case 27–CA–15477–5 formerly Case 19–CA–24648 respecting the information requests. On August 14, 1996, the Union wrote the arbitrator of the scheduled

arbitration asking the arbitration, then scheduled for September 10, 1996, be postponed on the basis that the Respondent had not provided necessary and relevant information. On August 23, 1996, Cory wrote to the arbitrator opposing the Union's request for a postponement. The letter noted the Respondent had made available to the Union all the "records used by Albertson's to determine the helper clerk ratio and were the only documents relied upon by Albertson's up to this point in time." The letter noted: "The photocopying process was started but ended rather quickly, primarily because of the quantity of records to be photocopied." The letter complained that the Union instead of resuming the copying process "had filed a [B]oard charge and since that time, there has been no effort made by the Union to obtain any of the information although it is still available at the store."

On August 23, 1996, Cory wrote McKittrick, with a copy to the arbitrator, offering to provide "on a non-precedential basis" "the same documentation relating to hours that Albertson's intends to use in preparing for the September arbitration." The information was specified as payroll history forms generated in late-July 1996, for current employees and duplicate timecards for former employees. It was offered as available for inspection and copying either at the "standard" rate of 20 cents per page on the Respondent's photocopier or "this one time on a non-precedential basis" on a union-provided copier at the store. The letter provided the Union could "do the work itself" or pay the labor costs of a courtesy clerk to do the copying.

On August 28, 1996, McKittrick wrote the arbitrator with a copy to Cory, Crane, and the Board agent investigating the pending charge. In it he complained of the veracity of Cory's recent representations by letter. He asserted that information had been denied to the Union on their store visit as being available only from Boise and complained that Albertson's had the capacity to generate the information sought by the Union, but rather was attempting to limit the Union to cumbersome and inadequate information. The arbitrator granted the postponement in effect deferring to the Board charge and investigation.

On September 4, 1996, Cory wrote to McKittrick challenging the notion that the payroll history forms were necessary and stating that duplicate timecards had been used by the Respondent to calculate the necessary ratios. The letter asserted the Union was not entitled in law to information in the precise form it desired. The letter noted an additional position would be forthcoming. On September 6, 1996, Cory wrote McKittrick telling him the salary forms were being generated and Local 8 should be able to copy all salary history forms at the store, but that the Respondent reserved the right to negotiate any substantial administrative costs involved in generating the precise forms demanded. Later in the month, Cory informed McKittrick of progress made in compiling forms which, by September 19, 1996, had resulted in 104 payroll history forms delivered to the store with but a single remaining form not yet located.

On September 20, 1996, Crane and his colleague, Sara Thody, picked up at the store the two packets of forms the store had received. He testified without contradiction that he was told by Agostinelli he could take them with him, if he agreed to bring them back if Agostinelli needed them. Agostinelli told him that he was not going to be using the forms. Crane took the

forms, copied and studied them. He found problems and reported the problems to McKittrick in a letter dated September 25, 1996. In essence he found some pages missing from individual histories, some histories missing entirely, one history apparently of a nonunit member, some job classification numbers not previously identified, and a duplicate page. He sought the missing material and information respecting the unknown classifications. McKittrick forwarded the letter to Cory.

Cory responded by letter dated October 1, 1996, complaining that Crane has taken the documents rather than copy them at the store. She also indicated the missing pages could not be ascertained until they received back the documents Crane had, but that the missing histories would be available at the store for coping if the other papers had been timely returned. She also indicated that a negotiation of administrative costs may be initiated by the Respondent "at some point in time" and that she would copy the arbitrator with the letter and seek a rescheduling of the arbitration. By letter of October 8, 1996, Cory supplied job classifications and asked for further information regarding what was missing from the job histories of six named employees. McKittrick responded by letter of October 15, 1996, describing the inadequacies and/or shortages of the personal histories of the individuals under discussion.

On October 31, 1996, the Regional Director for Region 19 issued a consolidated complaint against the Respondent respecting the store and Local 8 in three cases consolidated in the instant matter: Cases 27–CA–15677–5 formerly 19–CA–24648, 27–CA–15677–6 formerly 19–CA–24708, and 27–CA–15677–7 formerly 19–CA–24709. The Parties' counsel exchanged additional correspondence involving union questions and requests for clarification or additional information and the Respondent's replies. On July 21, 1997, McKittrick wrote Cory that he was moving the arbitration be rescheduled. The arbitration was held on February 5 and 6, 1998. The personal histories were used as evidence in the arbitration by the Union and were relied on by the arbitrator in his award, which issued on May 20, 1998.

(b) Analysis and conclusions

The General Counsel and the Union argue that the evidence supports their recurrent contention that the process the Respondent has established to deal with information requests is in essence designed to and regularly results in withholding and/or delaying the disclosure of relevant information. Thus, the Respondent required the Union to deal alternately with Agostinelli at the store level, Shin at corporate headquarters, and Cory as outside counsel. Each agent of the Respondent was zealous not to disclose information, to quibble and misunderstand union requests, to misstate earlier events, to withhold information based on their erroneous understanding of what has gone on before, and to simply refuse to disclose information and refer the Union to another agent of the Respondent.

For example, they argue, the Union is directed first to the store level for requested information. At the store meeting the Union was informed that the requested information was only be

¹³ The arbitrator held that both parties had placed "primary" reliance on the history reports in the arbitration.

available from Boise. Thereafter, the Respondent's outside counsel wrote that the information did not exist. Only after substantial and unreasonably protracted argument and delay were the requested records supplied and even then multiple errors and omissions requiring additional followup union requests. And throughout the process, Shin grossly misrepresenting the Union's dealings with the store director, threatened to delay or withhold information based on untrue allegations of purported union misconduct.

The General Counsel and the Charging Party Union also argue that respecting the disclosure of the records at the store level, the Respondent's unilaterally established charges for document copying were unreasonable and rendered the claimed disclosure of the duplicate time records ineffective.

The Respondent argues that the initially requested information alleged as withheld in complaint paragraph 59(a) were turned over in the store meeting in a timely manner. While there may have been additional questions that required further discussion regarding classification issues, the Respondent was reasonable and prompt in its disclosure.

Respecting the requested payroll history forms, the Respondent takes two positions. First, it asserts that its provision of the original or source documents, i.e., the duplicate timecards, was sufficient to satisfy its obligations under the Act. Second, the Respondent argues that it agreed to produce the payroll history forms in August 1996, and that, "[c]onsidering all of the circumstances, the alternatives provided, and the complexity of the matter, this did not constitute an unreasonable delay." (Respondent's posthearing brief, sec. II, complaint par. 59 at 2.)¹⁴

Dealing initially with complaint subparagraph 59(a)(ii), it is clear that at the meeting held on June 18, 1996, as the Respondent contends, the questions regarding unknown classification references in the Respondent's payroll records were addressed. While there was clearly more information needed over time, the store manager did continue to communicate with the Union regarding these matters, I do not find that the Respondent's responses respecting this request unreasonable or in violation of the Respondent's obligations under Section 8(a)(5) of the Act. Therefore, I shall dismiss this allegation.

There are several issues respecting complaint paragraph 59(a)(i), the request for payroll records showing weekly hours worked. I find in agreement with the Respondent that the request by its terms was fulfilled by the disclosure of the duplicate timecards. Thus I would have found, had the Respondent simply delivered a complete set of these documents to the Union on June 18, 1996, that the request was timely met. In the event, however, occurred the contretemps described above respecting copying costs.

The Government and the Charging Party correctly argue that the Respondent cannot unilaterally and for the very first time implement and rigidly insist on a particular copying fee for duplicating requested information. They argue further that the quoted rate was even higher than the rate charged to the public for the use of the Respondent's in store coin operated photocopying machine. The Respondent points out that the Union in

the initial information request letter asserted: "Therefore please be prepared to provide all copies of the requested information in writing and have available copies of the requested documents to be sold to me at a reasonable charge." Thus, the Respondent argues it was only doing as requested in setting a copying rate. Further the Respondent points out that the rate was not intended to be punitive or excessive and, importantly, no rate was in fact ever charged for any copying of the duplicate timecards.

Dealing with the narrow issue of the copying costs question as it pertains to the duplicate timecards, I find on this record in the unusual factual context presented, that there was no improper requirement of inflated copying costs sufficient to find that the Respondent improperly conditioned the disclosure of the duplicate timecards on June 18. This being so, I find that the Respondent did not improperly respond to the information request set forth in complaint paragraph 59(a)(i) and I shall dismiss this allegation.

Complaint paragraph 59(b) deals with the payroll history forms. There is no doubt they were requested, on and after June 20, 1996, by the Union and that the Respondent knew what they were when they were requested. The complaint alleges at subparagraph 59(d) that the Respondent in withholding them: "[s]ince June 20, 1996, and for an unreasonable time thereafter," violated Section 8(a)(5) of the Act.

The threshold issue raised is whether the Respondent had any obligation whatsoever to produce the payroll history forms. Thus, the Respondent asserts the duplicate timecards were what the Respondent relied on and should have been good enough for the Union. While Crane testified at the hearing that he wanted those documents for the additional record of wage rates, the Respondent answers that this was never made clear to it. The parties elicited testimony and argued at some length respecting the relative utility, efficiency, and efficacy of producing and using the payroll history forms in investigating and arbitrating the grievances involved.

I find that it is unnecessary to resolve the arguments for and against the utility or value of the payroll history records. Were I to deal with the issue I would rely heavily on the arbitrator's discussion of the documents in his award and, as he did, find them valuable. Rather, I answer the more limited question: Are the documents relevant to the grievance? That question I answer easily in the affirmative, for their content, including wage rates, is at the heart of the grievances in dispute.

The Respondent correctly cites cases that hold that a union is not necessarily entitled to information in the form it desires it—a position also taken by Cory in her September 4, 1996 letter to the Union, the last written before the Respondent agreed by letter of September 6, 1996, to prepare and disclose the requested payroll history forms. It is also true that an employer need not produce materials that are unduly burdensome or time consuming to compile. The General Counsel marshals authority for the proposition that the union is entitled to relevant information and that the information contained in the sought after payroll history forms was clearly relevant and more concise that the duplicate timecards and contained important and necessary information, such as wage rates, that the timecards did not.

Each case of this type must turn on its own particular facts and circumstances. Having considered the entire record re-

¹⁴ The Respondent's posthearing brief is organized in parts and is paginated only by subsection.

specting this allegation, I find and conclude, in agreement with the General Counsel and the Charging Party, that the Union was entitled to the payroll history reports. I so find for several reasons. First, the information sought was to be used in an arbitration proceeding, an adversarial proceeding in which the information process is more akin to that of litigation discovery than the investigatory information requests that occur in bargaining or in pregrievance filing investigation. The arbitrator found the documents at issue to be highly relevant, persuasive and reliable. To hold that the Respondent could have withheld them from the Union because they chose another evidentiary vehicle for their own investigation of the grievance and their own plan of proof at the arbitration would be an extraordinary holding with significant adverse consequences to the arbitral process. ¹⁵

Second, the documents in question are not an abstract data compilation the Union imagined out of thin air and then pressed the Respondent to produce for the very first time. The personal history reports are forms within the Respondent's recordkeeping world, produced and used by it in other settings and historically produced to the Union in other situations. These reports existed as a template or format for the expression of data within the Respondent's database, even if they did not have a "hard copy" existence, i.e., are not existing printed copies. 16 There was conflicting testimony respecting the ease with which the Respondent could or did generate these reports once it was of a mind to do so. I view the Respondent's suggestions that the reports were unduly burdensome to produce with skepticism. While the Respondent repeatedly suggested it reserved the right to seek recompense for the compilations, it never did so. Further it, too, used the documentation in the arbitration.

Having concluded the Union was entitled to the payroll history reports, the question remains: Did the Respondent unreasonably delay producing them to the Union given all the circumstances then pertaining? It is worthwhile to briefly recount

the timing. The request identified in the complaint was made on June 20, 1996. From the receipt of the request and Cory's initial letter of June 25, 1996, through Cory's letter of September 4, 1996, the Respondent refused to agree it was obligated to provide the documents. By letter of September 6, 1996, Cory indicated the forms were being prepared and would be made available. By September 20, 1996, the Union had received the bulk of the forms and, after more inquiries and exchanges, had received all but two reports by mid-November 1996. The final two reports were provided on December 11, 1996, although discrepancies, corrections, and clarifications respecting all the reports were discussed in correspondence well into 1997.

The Board cases with court approval establish that disclosure, if required, must be done in a reasonable period of time. This is consistent with the complaint's allegation that the Respondent's disclosure was subject to "unreasonable delay." The term, on this record, brings into play both the setting specific events and circumstances of the particular information request, the difficulty of obtaining the requested information and the circumstances of disclosure as well as the more global arguments of the parties respecting regionwide or divisionwide policies and practices of the Respondent and the Charging Parties

The period of late June through early September 1996, during which the Respondent refused to produce the documents or even concede to the Union that it had an obligation to produce the documents—delineated by Cory's initial letter of June 25, 1996, addressing the request and her agreement to produce the documents dated September 4, 1996, cannot be defended by any arguments dealing with the press of business nor the time needed to prepare or deliver the documents. The Respondent's open refusal was pure wrongful defiance unaffected by questions of workload or good-faith attempts to comply with the request. The refusal in the face of the obligation to disclose found above violates Section 8(a)(5) of the Act.

The period from September 6, 1996, through the completion of the disclosure process in 1997, raises the issue of whether or not the Respondent, having announced an intention to supply the information requested in September 1996, thereafter unreasonably delayed providing it. As the chronology indicates, much was provided initially but the diminuendo of data completion, correction and explanation ran on and on, generating a substantial correspondence and not concluding until July 1997.

The General Counsel bears the burden of proof respecting all allegations of the complaint. Here given the evidence that the Respondent—while not happily to be sure—had conceded it would provide the information and further given the absence of direct evidence that the Respondent: (1) engaged in a refusal to provide what information it had at any given time or; (2) deliberately slowed down its preparation of the information or; (3) deliberately interjected errors into the disclosed data. I find the Respondent's disclosure on and after September 6, 1996, not unreasonable, even given the passage of time involved until a complete and correct set of documents was finally obtained by the Union.

In reaching this finding I have considered the additional argument of the General Counsel and the Charging Party respecting the Respondent's general obfuscation in information cases.

¹⁵ In fact, the Respondent utilized the same payroll history records the union sought after they had been disclosed. The Respondent argues that its initial decision to withhold the documents was based in part on its decision that it would use only alternative records. Once it determined to use the records itself, the Respondent then decided to supply the information. The weakness of this argument is that it implies that the right of the Union to the information depends on the Respondent's decisions on what data it would use. To the contrary, the right of disclosure turns not on the subjective decisions of the Respondent respecting its own actions but on the objective fact of the relevance of the information sought and the other factors noted above.

¹⁶ Cory in her letter to the Union of June 25, 1996, stated:

Mr. Crane repeatedly requests in his correspondence a payroll history form. That document in that form does not exist beyond the time period for which you already have that document.

In the modern world of electronic data bases, many data compilations or reports are not printed into "hard copy" documents and stored in that form, thus they do not "exist" in the sense of an existing paper document. Yet, essentially at the "push of a button," standard reports or other data compilations may be retrieved, viewed on screen, and printed out on paper. So, too, modern software allows customized compilations and presentations of information contained in data bases with much less difficulty that the now out of date hunt through vast collections of physical records in archival storage to retrieve necessary information

Thus, the Government and the Charging Party argue that the disclosure process was attenuated, delayed and made more difficult by the systematic division of the Respondent's duties. Thus, "Boise" or the labor relations department makes decisions respecting disclosure and causes documents to be prepared at headquarters, but rather than directly supplying the information to the Union these agents tell the Union to retrieve the documents at the store from store staff. Statements and actions taken by and between store directors and union officials are either misreported by store agents to Boise or outside counsel or deliberately misperceived by these agents of the Respondent and they then wrongfully criticize or limit union agent access to information. The Government and the Union view this process with alarm finding intention and design by the Respondent's labor relations staff in the delays, confusion, and frequent mistakes and misunderstandings that are increased as a result of the Respondent's disclosure process.

Having considered these arguments in weighing the actions of the parties during the time period addressed, although the issue is not free from doubt, if viewed in isolation I would not necessarily find the Respondent's conduct unreasonable or in breach of the requirements of the Act. However, as discussed in the analysis of similar conduct in the analysis of other allegations below, I find the Respondent's labor relations department has regularly utilized the process of transferring documents to the stores, thereafter directing the union to the stores to obtain the information in a manner which reveals it to be an unreasonable means of delaying the disclosure process and making the unions obtaining of the information more difficult. Based on the entire record in this matter, I find the Respondent's conduct in this regard herein is unreasonable and violates Section 8(a)(5) of the Act as alleged.

The Respondent also offers its own global arguments in its defense. As discussed at length in other sections of this decision, the Respondent viewed the union agents of Local 8-and other Locals—as filing large numbers of information requests and acting in all information request situations with a view to harassing and burdening the Respondent as a means of increasing the Respondent's costs of contract administration in order to pressure it to take certain actions. This conduct, in its totality, argues the Respondent, did in fact burden the Respondent and caused it to be slower to produce information despite all reasonable efforts to do so simply because of the press of business caused from the artificially increased work generated by the Union's efforts to "swamp" the Respondent's labor relations department. I have rejected this argument, supra. Further, considering the Respondent's global argument only as it applies to the particular complaint allegations under consideration, the Respondent's claims are irrelevant because the violation found resulted from a refusal to supply information in the period discussed not the subsequent delay in supplying it after the Respondent agreed to do to provide the information.

(3) Complaint paragraph 60

Complaint paragraph 60 alleges:

(a) On various dates including June 19 and July 9, 1996, UFCW 8, in writing, requested Respondent to provide documents relating to Respondent's position concern-

ing a grievance filed on behalf of Richard Alan Frye at Respondent's store in Great Falls, Montana and documents which show checker numbers and work schedules relating to said grievance.

- (b) On various dates including June 21 and July 18, 1996, UFCW 8, in writing, requested Respondent to provide documents relating to Respondent's position concerning a grievance filed on behalf of Thomas Frickle at Respondent's store in Great Falls, Montana and documents which show checker numbers and work schedules relating to said grievance.
- (c) On various dates including orally during about the first week of September, 1996, and in writing on about September 30, 1996, UFCW 8 requested, in relation to grievances filed on behalf of Richard Alan Frye and Thomas Frickle, that Respondent provide "master tapes" and/or "detail tapes" showing a listing of all periods and the duration of each period during which specific "checker numbers" were used.
- (d) The information requested by UFCW 8 as described above in paragraphs 60(a)–(c) is necessary for, and relevant to, UFCW 8's performance of its duties as the exclusive collective-bargaining representative of the Great Falls Clerks Unit described above in paragraph 16 and is a mandatory subject for the purposes of collective bargaining.
- (e) Since June 19, 1996, and for an unreasonable time thereafter, Respondent through its agents, including Sarah Shin, has delayed, failed and refused to furnish UFCW 8 with the information requested by it as described above in paragraphs 60(a)–(c).

(a) Facts

The relevant contract at the Great Falls store provided different rates of pay for courtesy clerks and all-purpose clerks and a pay progression for wage classifications. It also provided that all claims or grievances must be "presented" within 30 days "from and after the time they are alleged to have arisen" or be "forever waived."

Crane received complaints from part-time store employee and high school student Richard Frye that he was classified and paid as a courtesy clerk, yet was being required to check to such an extent that he should be paid a higher rate under the contract. Individuals who check are given individual numbers that are entered into the checking equipment and record each checked transaction in association with the checkers identifying number.

On June 19, 1996, Crane mailed to Contract Administrator Sarah Shin a letter titled "Grievance—Rate of Pay—Richard Alan Frye." The paragraphs describing the grievance and desired remedy recite:

Specifically, since on or about April 7, 1996, Mr. Frye has been assigned to check as store #211. At that time Mr. Frye was classified as a Courtesy Clerk. Despite the assurances of Store Director Agostinelli, Mr. Frye was not promoted to the All Purpose Clerk classification and provided an attendant wage increase until approximately the week ending May 25, 1996. Even then, Mr. Frye received

an inferior rate of pay in that he had not been given credit for one-half of his Courtesy Clerk hours for pay progression purposes.

To resolve this dispute, Mr. Frye is to be made whole and the Employer is [to] pay Mr. Frye correctly in the future.

The letter continued:

Should the Employer refuse to resolve the grievance as requested above, please provide us within fifteen (15) days of the date of this letter with the following information.

1-The specific reasons which form the basis of the Employer's action which precipitated this grievance. Please provide us with copies of all documents, memoranda, and records which form a basis for your company's decision and/or position, including but not limited to a listing of all periods and duration of each period during which checker numbers 132132, 10139 and 104104 were used and copies of the work schedules from April 7, 1996, to present.

By letter dated June 21, 1996, to Shin, Crane filed a grievance respecting part-time high school student Thomas Frickle. The letter, similar to the Frye grievance, asserted that Frickle had been assigned to check since March 9, 1996, but did not receive an all-purpose clerk classification nor its wage rate until the week ending April 6, 1996. And like the Frye grievance added: "Even then Mr. Frickle received an inferior rate of pay in that he had not been given credit for one-half of his Courtesy Clerk hours for pay progression purposes." The letter made the same information request tailored to Frickle as had been made for Frye save that it referred only to a single checker number: 130130.

Contract Administrator Shin was on honeymoon leave from work from June 19 or 20 until the latter part of the second week of July 1996, and the matters directed to her by Crane were not responded to by others. In the absence of a response to the June 19, 1996 letter, Crane sent Shin a letter dated July 9, 1996, asking for a response to the Frye grievance and its request for information asserting that, if the requested information is not received within 10 days, the Union will be "forced to pursue [other] courses of action."

Contract Administrator Shin responded to the Frickle grievance by letter dated July 18, 1996, charting a factual denial of the grievance without addressing the information request. It asserted that Frickle was promoted in the week ending March 30 and paid immediately and correctly, including proper credit for courtesy clerk hours. Shin responded by letter dated July 22, 1996, to the Frye grievance. The letter denied the grievance with a similar factual recital, concluding as did the Frickle letter a few days earlier that the grievance was "without merit and appears to be non-arbitratable. Please call should you have any further questions."

President Crane answered Shin's Frickle response by letter dated July 22, 1996, disputing Shin's factual recital of events and repeating the information request in the grievance letter of June 21, 1996. There is no record evidence he wrote a similar letter as to Frye. On August 7, 1996, Crane filed the two original Region 19 Board charges dealing with the Frye and Frickle

grievances. Those charges are now numbered: Cases 27–CA–15477–6 and 27–CA–15677–7.

By letter dated August 22, 1996, Shin informed Crane that work schedules and periods in which checker number 132132 was used and the duration of those periods could be obtained "at store level." The letter indicated that the other two checker numbers were for the store manager and key person and asserted: "We do not see the relevance of those [checker] numbers." By second letter the same day Shin directed Crane to the store to obtain the same information respecting Frickle and checker number 130130.

The registers at the Great Falls store at the time in question recorded both normal customer paper tape receipts and a second continuous internal "detail tape" recording transactions by checker number, date and time of transactions, and amount of transactions. They typically recorded several days' transactions and were kept for a time at the store. Crane testified he had it reported to him that Frye and Frickle had early on, as instructed, done checking under several checker numbers including those identified by the Respondent as the store director's and the key person's. Crane testified he wanted to determine when the grievants and the store manager and key person were working and compare those times with the times when the grievants, and store director and key person's checker numbers were in use on store registers.

By agreement Crane and Thody met at the store with Agostinelli in late August or early September to look at records. The Union sought and received scheduling information. Crane asked for information that would reveal the dates and times individual checker numbers were used on store registers. The store manager answered that he did not have that information but the Union could inspect the detail tapes. Crane received a box of store tapes from the store manager on September 18, 1996, who told him they represented March and April tapes. The Union thereafter inspected the tapes to ascertain the dates and times the relevant numbers were used on each register. There were a substantial number of missing tapes. Crane returned the box to the store director describing the omissions. The store director gave Crane another box and the Union repeated the process. Crane testified he returned the second box and was told he would have to return for additional tapes. Crane delivered a letter to Agostinelli on September 30 detailing the missing tapes not present in the boxes of tapes provided and asked that the missing tapes be located and provided. In a final meeting in late October 1996, the store director told Crane he could not find some of the missing tales.

(b) Analysis and conclusions

The threshold issue respecting the information requests in complaint paragraph 60 is the Respondent's claim that the facial invalidity of the grievances underling the information requests was such that there was no statutory obligation on the part of the Respondent to reply to the request or supply information. Counsel for the Charging Party emphasizes that this defense was never raised by Shin nor the store manager in the entire period the two grievances were at issue and any suggestion by the Respondent that Shin's initial references to the grievances that each was "without merit and appears to be non-

arbitratable" is simply sophistry. She emphasizes that Shin from the beginning simply denied the underlying facts that the employees had been checking before their classification and were in consequence misclassified and denied the timely wage increases to which they were entitled.

The merits of a grievance do not determine the Union's right to information respecting it. Although there may be some level of facial invalidity that renders a grievance obviously frivolous, this is not the situation here. First, the grievances are at least in part, immune from any timeliness objection because they allege continuing violations by the Respondent. Second and sufficient standing alone to defeat this defense of the Respondent, I agree with the Charging Party that the Respondent at no time made it clear that it was raising timeliness as a basis for contesting the grievances or refusing to supply the information. Rather the entire series of the Respondent agents' communications with the Union dealt with the underlying facts. If there were even a possible defense to the information request obligation at issue herein, it was not manifested by the Respondent and was rather waived by its conduct as a whole. Given all the above, I find the Respondent was obligated to respond to the information request without statutory limitation or other license to do less than otherwise required based on the merits of the grievances.

The complaint at subparagraph 60(e) alleges that the Respondent for an "unreasonable time" after the requests "delayed, failed and refused" to supply the information. This general pleading must be considered and applied to several different periods in the Parties' dispute. The first "period" to be tested under the reasonable good-faith effort to respond standard is the period from the filing of the requests described in complaint subparagraphs 60(a) and (b) to the date of initial response of the Respondent through Shin—a period of a month. In that period, the Respondent took no action.

There was no suggestion nor evidence in the record to support a finding that the Union's grievances and requests for information were misdirected or that the Union knew or should have known that Shin would be on vacation during this period. There is no evidence the Union was told simply to hold on until the return of Shin. Further there is no suggestion that the Respondent did not know that Shin would not be available for the relevant period to undertake her duties on the Respondent's behalf. There is no evidence of an inexplicable or unforeseen failure of a backup system by which Shin's responsibilities—and the reading of union correspondence to her—would be answered by other agents of the Respondent.

The issue as to this period of time comes down to the bare question: May an employer manage its affairs so that there is a risk if not a likelihood that union requests for information will not be responded to for up to a month without telling the Union that it has made such arrangements and without responding to the information requests? I find and conclude for an employer such as the Respondent herein respecting Local 8 and the employees of the Great Falls store, that the employer may not. Such omission to respond is at the very least unreasonable and violates Section 8(a)(5) of the Act. ¹⁷ Indeed a failure to re-

spond is worse than an affirmative refusal communicated to provide information, for in the latter case the Union at least knows where it stands. In the instant case the Union was put to the wasted motion of sending additional correspondence to Shin seeking a response. I find therefore that up to that point, the Respondent violated Section 8(a)(5) with respect to complaint allegations 60(a) and (b).

The second period of time at issue is that from and including the initial Shin responses of mid-July through her provision of information by letter of August 22, 1996. At no time until August 22, 1996, despite the further correspondence of the Union noted above, did the Respondent supply the information nor even refuse to supply it. Rather the Respondent simply was silent. The Respondent on brief argues the initial information requests were unclear and inartfully phrased and in consequence created no obligation on the Respondent's part to reply. I reject that contention. First, I find the requests did in fact make clear that the Union was requesting both the information on which the Respondent relied in making its reclassification decision and—in the inartful "including" clause—additional information. Even if the Respondent was confused, it should have asked the Union what it wanted and not stood silent and non-responsive. I find that the Respondent's conduct in not supplying the information requested was unreasonable under all the circumstances and also violated Section 8(a)(5) of the Act. 18

The final period of time at issue occurring under paragraphs 60(a), (b), and (c) of the complaint, is the time following Shin's August 22, 1996 referral of the Union to the store for the obtaining of requested information. That period from late-August 1996, through the final visit of Crane to the store in late-October 1996, involved problems with the completeness of the documents initially provided and, finally, an announcement by the store manager that no more records were available. The General Counsel and the Charging Party take their general position that this period of visit and revisit to the store for documents that should have been provided long before was unreasonable and a continuing violation of the Act. The Respondent counters that it is not evident that the Respondent withheld or was less than zealous to turn over the documents. Further the Respondent notes that the documents were haphazardly maintained and stored by the Respondent. Finally, the Respondent argues that, since there is no way of knowing whether a particular register at the store generated tapes for given period, there is no evidence respecting just what in fact constituted a complete set of tapes or that the entire set of tapes was not in fact disclosed to the Union. I have examined the record respecting

fuse to respond to information requests. I find as a matter of law that when the Respondent consciously chose not to provide staff to even answer the mail let alone handle requests such as those made herein by the Union, it bore the risk that information requests would be unanswered. Having set up and maintained the system, it must bear responsibility for the likely consequences of that system. I find the Respondent's indifference to the receipt of union requests is no different that if it had read the information requests when they arrived and made a conscious decision not to respond to them.

¹⁷ It might be argued that the Respondent in not providing an agent to read the Unions' mail was not consciously deciding to reject or re-

¹⁸ Further, the failure of Shin to address the information request on her return demonstrates that it was neither the press of business nor her absence that prevented her from providing the requested information.

these exchanges in the context of the record as a whole and do not find the efforts of the store manager during this period regarding these tapes were so unreasonable as to violate of the Act. Thus, I find that as to complaint sub-paragraphs 60(a) and (b), the period during which the violation occurred ends as described earlier and complaint paragraph 60(c) is without merit and will be dismissed.

Two areas warrant further discussion. The first is the Respondent's general argument that the Charging Parties sought to overburden the Respondent's labor relations department. Once again I do not find that defense relevant to this allegation because the violations found deal with the Respondent's refusal to provide information rather than delays in obtaining/disclosing information once a determination had been made to disclose it. I also do not accept the argument of the Respondent that the Union was engaged in misconduct that must be considered in the balance when it files simultaneously both a grievance and a conditional request for information which comes into play if, and only if, the Respondent does not accept the merits of the grievance and the Union's proposed remedy. If an information request is proper, it matters not that it is explicitly conditional to "coerce" the Respondent into agreeing with the Union or bearing the burden of answering the request. That is the reality of any information request associated with a grievance, be it explicitly stated or not. If the employer agrees with the union on the merits of the grievance and communicates that fact to the union, the matter can be quickly resolved and no information needs be disclosed. If the merits or the grievance or the remedy sought is disputed, the information requested must be timely and reasonably supplied. An information request will therefore stand or its own feet and the employer's obligation to provide the requested information under the Act is not reduced by presenting the request in such a conditional mode.

Second, in making the findings and conclusions above, I have considered and rejected the argument of the Respondent that the grievances involved were of such minor consequence that either there was less need for speed in reply or less of a need to provide information respecting them. I accept the Respondent's calculations that the amounts in controversy concerning the two high school student/part-time employees wage rates were less that \$10 per week—a small sum when compared to the costs of staff time and resources associated with the Respondent's dealing with the grievances as well as the costs in staff time and resources of the Union in investigating and advancing the grievances. I do not accept that this ratio of cost and expense to money in contention is the relevant or even a relevant standard for evaluating the obligation of the Respondent to supply the information requested. Obviously the dollar amount was of larger consequence to the individuals involved and was certainly of sufficient importance to the Union that undertook a lengthy examination of the records disclosed by the Respondent. On this record, I find the amount in contest was not a controlling or even significant element in the Respondent's defense. Even were it so, given the other factors present respecting these events, it would not have changed the result reached.

(4) Complaint paragraph 62

Complaint paragraph 62 alleges:

- (a) Since about March 21, 1997, in writing, UFCW 8 requested Respondent to furnish the following information relating to a grievance filed at its Great Falls, Montana Store:
- (i) the specific reasons for Respondent's actions as described in the grievance;
- (ii) all documents, memoranda and records, including but not limited to a written summary organized by employee, which shows all \$10.00 contributions, withheld from employees' pay during each month.
- (b) The information requested by UFCW 8 as described above in paragraph 62(a) is necessary for, and relevant to, UFCW 8's performance of its duties as the exclusive collective-bargaining representative of the Great Falls Clerks Unit described above in paragraph 16 and is a mandatory subject for the purposes of collective bargaining.
- (c) Since about March 21, 1997, and for an unreasonable time thereafter, Respondent through its agents, including Sarah Shin, has delayed, failed and refused to furnish UFCW 8 with the information requested by it as described above in paragraph 62(a).

(a) Facts

At relevant times the contract covering the Respondent's Great Falls store provided for a monthly contribution of \$10 to the Montana Retail Store Employees Health and Welfare Trust. In early March 1997, the Union received complaint of multiple health and welfare deductions. By letter dated March 21, 1997, Crane filed with Shin a grievance complaining of "multicontributions for certain bargaining unit members for at least the month of March 1997." The letter utilized the grievance-conditional information request format discussed supra. It asked for:

[C]opies of all documents, memoranda and records which form a basis for your company's decision and/or position, including but not limited to a written summary by employee of all \$10 contributions withheld from employees pay each month such withholding occurred.

Not receiving a reply, Crane sent a second letter to Shin dated April 8, 1997, complaining that a reply had not been received respecting either the grievance or the information request submitted in his March 21, 1997 letter.

Counsel Mark DeMeester, the attorney for the labor relations unit handling the Great Falls store, addressed the request. He testified he read the grievance and request for information to address and seek information respecting alleged multiple accruals in any given month as opposed to multiple payroll deductions in any given month. He caused a chart to be prepared by the Respondent's payroll department respecting accruals in a 3-month period of December 1996 to February 1997, and submitted it to the Union as an attachment to his own letter of April 15, 1997, in which he recited the contracts terms, denied double or multiple obligations had been incurred and asked the Union

to explain its allegation and specify the employees and months for which "such improper contribution allegedly occurred."

Crane wrote to DeMeester on April 21, 1997, complaining that DeMeester did not address the issue of "multiple \$10 deductions" in the work month of March 1997. The letter asserted:

The Union again requests the following information: a written summary by employee of all \$10 co-contributions withheld from employees pay each month (including March 1997, and now subsequent) such withholdings occurred and copies of all documents, memoranda and records which form a basis for your company's decisions and/or position in instituting multiple withholdings.

DeMeester testified that Crane's April 21 letter clarified the Union's grievance and he thereafter understood that the allegations addressed not multiple monthly accruals but rather multiple deductions in single months. He directed the payroll department to address the issue. A matrix of accrual periods and weeks of actual payroll deduction for each employee was prepared and submitted by DeMeester to Crane along with his letter dated June 11, 1997, in which he asserted that reference to the chart would indicate that, while no employee was accruing or was charged more than the regular \$10 monthly amount, some employees had had their payments deducted in such a manner that two deductions had fallen in a single calendar month, i.e., the amount was correct, even if the timing of the deductions was not similarly partitioned into separate months in every case. Finally by letter dated June 17, 1997, the Respondent informed the Union that, to the extent the two charts earlier sent presented differences, the more recent charge would control

(b) Analysis and conclusions

The General Counsel and the Charging Party argue that the Respondent delayed from the date of the initial request's receipt soon after March 21, 1997, to DeMeester's initial letter of April 15, 1997—over 3 weeks—to respond to the grievance and information request. Further, they argue that the initial reply to the request was nonresponsive and purposefully misread the information request. After the explicitly clear union letter of April 21, 1997, DeMeester did not respond for a month and a half, until June 11, 1997,—after the instant unfair labor practice was filed on June 2, 1997, before addressing the request and even then had to follow up on June 17, 1997, with a clarification.

The Respondent argues that the grievance and information request was confusing and was reasonably read by DeMeester as asking for information on accruals rather than deductions. DeMeester testified that he attempted to respond to the information request as he understood it, initiated the inquiry to the payroll department that produced the chart which he sent to the Union, and did not attempt to slow down the process. Again, when receiving the Union's clarifying letter, DeMeester initiated the investigation by the payroll department of the dates of employee payroll deductions rather than accruals, obtained the chart, and forwarded it to the Union without deliberate delay. The Respondent justified the time taken by the payroll depart-

ment to uncover the relevant data and prepare the noted charts by the simple assertion that its payroll department "obviously had other duties such as preparing the weekly payroll." (Respondent's posthearing brief at complaint par. 62, p. 7.)

I find insufficient evidence to establish that the initial response of DeMeester to the request was unreasonably delayed. I further find, crediting DeMeester, that the Respondent did not deliberately or unreasonably "misread" the Union's initial request and deliberately respond in a manner not called for in the original request. Three weeks under all the circumstances for a response to the inquiry as understood by DeMeester at the time was not unreasonable.

While the Respondent argues on brief that the later "clarification" letter of the Union dated April 21, 1997, was not pled as a information request, I find that the letter served, as it was intended, to put the Respondent explicitly on notice of what was requested and in essence constituted another information request cognizable within the pleadings. Therefore there remains the issue of the reasonableness of the Respondent's June 11, 1997 response to the April 21, 1997 letter both as to timelines and in the need for the followup instructions of the letter of June 17, 1997.

I find that the June 17, 1997 correction letter is on no significance. Errors can and do occur but I have found elsewhere in this decision that the Respondent has often been careless with the accuracy of the information submitted to the Union. Considering the entire record regarding these events I do not find that there had been a deliberate deception or, unlike other errors discussed elsewhere in this decision, a negligent effort on the part of Respondent to avoid error. The issue remaining for resolution then, is whether or not, in light of the entire set of circumstances, as described in part above, the Respondent could have reasonably taken from April 21 to June 11, 1997, to, in effect, redo or expand its earlier chart to address the "deductions" rather than "accruals" that occurred.

I find that the period taken by the Respondent in the context of this grievance and information request was unreasonably long and therefore the Respondent's delay violates Section 8(a)(5) of the Act. First, the period of April 21 to June 11, 1997, may not be looked at in isolation. The initial request came on March 21, 1997, with a union followup letter seeking a response on April 8, 1997. While I have found that the Respondent did not unreasonably delay or misrespond to the initial request, I do not find that the Respondent was completely without fault for reaching the conclusion it did respecting the information request without inquiring of the Union. Thus, when the Respondent received the April 21, 1997 request clarification it was not starting with a clean slate and was not entitled to act as if this was a de novo information request unaffected by what had gone before.

Further, even were the April 21 to June 11, 1997 period viewed in isolation, this response time of over a month and a half was unreasonably long under all the circumstances. The initial response—which involved utilizing the payroll department to gather related information respecting contributions—took from the receipt of the Union's March 21, 1997 letter until April 15, 1997,—some 3 weeks. If the first response from labor relations utilizing its payroll department to prepare the

necessary document could be consummated in 3 weeks time, the second response should not have taken twice that. As the General Counsel notes, the delays of the payroll department are simply part of the Respondent's overall delays. Without more testimony than was offered on this record, there is no basis for finding extraordinary circumstances which might justify this laggard performance. The Respondent argues that the payroll department had to get out the payroll. Surely true and likely done at least fortnightly, if not weekly. That is not a sufficient excuse for the delay in question even assuming it is to be entirely attributed to the payroll department not having been told to "put a rush on it." The record is replete with evidence that the labor relations department staff regarded the questions and problems of the operating units as of the highest priority and attended to them promptly putting such mundane matters as union information requests aside until the more important business was concluded. It is clear and I find on this record that the information request involved herein-and many others as discussed throughout this decision—would have been more timely completed and the information compiled and disclosed had a "client" of the Respondent's labor relations department—i.e., an operating unit of the Respondent—been in need of the information.

b. Local 368A—Complaint paragraph 74

Complaint paragraph 74 alleges:

- (a) On various dates including September 3, September 30, October 7, October 9, November 23 and December 24, 1997, UFCW 368A, in writing, requested that Respondent provide to UFCW 368A the names, addresses, classifications, wage rates, date of hire, and social security numbers of all employees covered by a collective-bargaining agreement in the jurisdiction of UFCW 368A.
- (b) The information requested by UFCW 368A as described above in paragraph 74(a), is necessary for, and relevant to, UFCW 368A's performance of its duties as the exclusive collective-bargaining representative of the Idaho Grocery Unit described above in paragraph 54 and is a mandatory subject for the purposes of collective bargaining.
- (c) Since about September 3, 1997, and for an unreasonable time thereafter Respondent through its agents including Sarah Shin and Karen Casey has delayed, failed and refused to recognize and bargain with UFCW 368A as the exclusive collective-bargaining representative of the Idaho Grocery Unit described above in paragraph 54 and refused to provide UFCW 368A with the information which it had requested as described above in paragraph 74(a).
- (d) Since about September 3, 1997, and for an unreasonable time thereafter Respondent through its agents including Sarah Shin and Karen Casey has delayed, failed and refused to recognize and bargain with UFCW 368A as the exclusive collective-bargaining representative of the Idaho Grocery Unit described above in paragraph 54 by insisting that UFCW 368A utilize a burdensome procedure to obtain the information set forth in paragraph 74(a) above, where Respondent has such information available

in a more convenient form and refuses to provide UFCW 368A with such information through an existing, less burdensome procedure.

(1) Facts

In the late summer of 1997 Local 368A represented, inter alia, 26 of the Respondent's retail stores in Southern Idaho and Eastern Oregon. The Union at that time determined to update its represented employee records. Lori Barton, then a new business agent for the Local testified she was assigned the duty of updating payroll information by going to each of the Respondent's retail stores and obtaining what she had been told by her superiors was a "printout" of unit employees' names, addresses, job classifications, wage rates, dates of hire, and social security numbers. She had difficulty at the stores, in some cases being instructed upon her arrival to make appointments and return only at the appointed time. From other stores she did not obtain all the information she sought and from others she obtained nothing.

Upon learning of her lack of success, Local 368A President Everett Grimes sent a letter dated September 3, 1997, to Labor Relations Contract Administrator Sarah Shin requesting the Respondent:

[F]urnish Local 368A the names, addresses, classification, wage rates, date of hire, and social security numbers of all employees covered by a collective-bargaining agreement in the jurisdiction of UFCW Local 368A.

Shin responded by letter of September 11, 1997, which stated in part:

This information may be available at store level for each bargaining unit employee. Once you have contacted to Store Director to arrange a convenient time to meet, they will provide you a place to write/work so that you may record the information as they present it to you.

Grimes, by letter of September 30, 1997, to the Respondent's labor relations manager, Karen Casey, "once again" requested the identical information asking: "Please forward a computer printout showing all of the requested information to this office." Shin in turn answered Grimes letter to Casey with a letter to Grimes dated October 3, 1997, indicating the Respondent's September 11, 1997 letter would stand and enclosing a copy of that letter.

On October 9, 1997, counsel for the Local, David Rosenfeld, wrote Casey seeking the same information and asserting further:

Albertson's has attempted to respond by saying that Mr. Grimes can go from store to store to get this information. Plainly this is information which is there but in your payroll department and Mr. Grimes should not be required to go to each store and physically write down this information.

Meanwhile, upon receipt of Shin's September 11, 1997 letter, Barton testified she took the letter with her and visited stores #154, #101, and #169 to obtain the needed information. The process was not satisfactory. At store #154 the information was provided orally at a rapid rate and Barton was obliged to seek repetition. The process consumed over an hour, there was

a clear risk of copying errors and after that time she had not obtained employee addresses nor job classifications. At store #169 her initial meeting with the bookkeeper in October was cut short by the store director who stopped the process and told Barton his bookkeeper did not have time for the task. Barton was told to make an appointment and return yet another day. The bookkeeper was not again available until January 1998, at which time Barton returned and received most of the information. Again at store #101, Barton made an appointment and was given some information orally or was allowed to copy other information from documents, but all the requested information was not available and again, the store director stopped the process and sent Baton away instructing her to make another appointment to continue the process.

Grimes spoke with Shin on October 9, 1997, complaining of the Union's difficulty in obtaining information at the store level. Shin wrote Grimes by letter dated October 13, 1997, asking the Union to "provide us with store numbers and Store Directors the Local #368-A allege are not supplying the requested information." The letter noted that the Union had complained the information was "too arduous to compile" and had asked for a master report. Shin responded:

In response to your inquirer[y], I am not aware of any such report. Accordingly, please continue to compile this information as we advised in our September 11, 1997, letter.

Casey responded to Rosenfeld by letter dated October 24, 1997. She asserted in part:

Albertson's and UFCW Local 368-A have approximately 50 collective-bargaining agreements covering 26 stores in Southern Idaho and Eastern Oregon. . . . Albertson's and UFCW Local 368-A have a long and established past practice of making the information that your requested, other than social security numbers, available at store level.

. . .

However, if you wish to meet with me in Idaho to discuss your request to change past practice and explain the reasons why you believe this is appropriate, and to bargain over the costs of information that cannot be readily attained off our company database, I would be more than happy to do so.

Casey and Rosenfeld exchanged further correspondence without resolving the issue or reaching an agreement. Casey did make clear in her January 7, 1998 letter to Rosenfeld:

However in response to your question about what information is solely available at store level, schedules and presumably employees [sic] home telephone numbers if available are kept at store level. In response to you question of what information is available in Boise, the names, addresses, job codes, wage rates and dates of hires for employees can be obtained from a company report.

I once again renew my offer that you meet with me in Idaho . . . to bargain over the costs of information that cannot be readily attained from a company report.

The Respondent, by way of the testimony of Shin, suggested that the information sought by the Union was not available in particular reports maintained by Boise and the large number of stores and contracts involved made it difficult to determine from the Boise records who was and who was not in represented units and what their wage rates were. Shin testified that she made her own unsuccessful attempts to cobble together the requested data from different reports. She also testified she spoke to a headquarters information technology department programmer who told her that they had a 3-month backlog on programming projects and that even if they wrote a program to obtain the information requested, the program would founder on the lack of a standardized job classification nomenclature across all represented stores to determine who was represented and who was not.

(2) Analysis and conclusion

The General Counsel's complaint alleges that the Respondent was obligated to supply the Union's request for the names, addresses, classifications, wage rates, date of hire, and social security numbers of represented employees. The Respondent raises a defense that must be addressed at the threshold of the analysis: that it is not obligated in law to provide social security numbers of employees.

As the Respondent has developed at length on brief, the Board does not find social security numbers of represented employees presumptively relevant to the Union. To justify a request of the employer for social security numbers of represented employees the Union must show the relevance of the information to the Union in its representational role. I do not find this line of cases relevant herein for the following reasons. First, it is clear that the Respondent had long supplied social security numbers to the Union during store visits by union officials and the Respondent at no time raised an objection to such disclosure at the store level. Indeed, there is affirmative evidence that Barton received employee social security numbers during her visits to stores. This being so, I find the Respondent had waived any assertable "confidentiality" or other unique defense to the provision of social security numbers during the events at issue.

I specifically find both that the information requested was necessary and relevant to the Union's performance of its duty as a collective-bargaining representative and that the Local was entitled to receive all the information it asked for. More specifically, it was entitled to the information listed in complaint subparagraph 74(a):

[T]he names, addresses, classifications, wage rates, date of hire, and social security numbers of all employees covered by a collective-bargaining agreement [with the Local]....

¹⁹ Grimes testified that the Union uses social security numbers in maintaining its health and welfare records for employees. Were it necessary, I would find that such an information retrieval system respecting health matters—in which industry I administratively notice, social security numbers are an important and ubiquitous key number for individuals—makes the employees social security numbers relevant and necessary to the Union's representative role and supports required disclosure.

It hardly tests the limits of the law to state that a labor organization that represent bargaining unit employees is entitled to the names of the employees it represents, their job classifications, wage rates, and date of hires.

That finding however, only brings the analysis to the heart of the dispute respecting this allegation: whether or not the Respondent satisfied its obligation to provide the information by directing union personnel to make appointments at individual stores with store directors or their designated agents and, to visit the store at the appointed time and copy down in longhand the information provided by the Respondent either from oral presentations or by copying the relevant entries from various multiple documents shown to the union agent. The contention of the Government is that this procedure was both flawed in theory and was even more flawed in application. The complaint alleges it is a "burdensome procedure" at complaint subparagraph 74(d). Coupled with the alleged "burdensome" procedure, the General Counsel's complaint subparagraph 74(d) alleges that the Respondent refused to provide the requested information "in a more convenient form" "through an existing, less burdensome procedure."

There can be little doubt that it was both burdensome and onerous for the union agents to be required to physically visit each store—totaling some 26—and go through a ritual of personally writing down information read aloud or recording information copied from various and numerous forms—all in real time at the stores. In the described actual attempts to follow the procedure it is also clear the press of other business on the Respondent's store based staff as well as the length of time necessary to tie up that staff to accomplish the process meant that a single visit was often insufficient and additional appointments for repeat visits had to be made—with the inevitable lengthy delays in finding dates of mutual availability. Further, and importantly, the entire copying process seemingly maximized the likelihood of copying and transcription errors occurring.

The General Counsel and the Charging Party argue that it is simply absurd and strong evidence of bad faith for the Respondent to insist that the Union jump through the hoops described above. Counsel for the Union notes that Shin was well aware of the difficulty that was being created as revealed by the statement in her September 11, 1997 letter that the store director "will provide you a place to write/work so that you may record the information as they present it to you." They argue the pen and quill technique the Respondent sought to impose on the Union is clearly revealed as part of an unreasonable and malign scheme when it is considered that the Respondent—a large and modern corporation—had a centralized payroll department with a computer database accessible from the desktop computers of the labor relations staff. As Casey told Rosenfeld in her January letter: "the names, addresses, job codes, wage rates and dates of hires for employees can be obtained from a company report."

The Respondent argues that the information at issue had traditionally been obtained by the Union at store level. It notes that Shin, the labor relations staff member involved, attempted, but was unable to generate the records that the Union sought at headquarters and even contacted a programming employee of the Respondent in a futile effort to obtain the information the Union sought from the Respondent's database. Finally, the Respondent points out that it offered to meet and discuss with the Union the possibility and cost of obtaining the information centrally, but the Union never took them up on their offer.

The Board standard in this area, like so much underlying the information provision under Section 8(a)(5) of the Act, has its roots in reasonableness. An employer has no obligation to distill and extract at great cost and inconvenience information requested by the Union in a particular manner and form, if alternatives are satisfactory. However, an employer may not with impunity needlessly make it difficult for the Union to obtain relevant information necessary to its representative role.

It is also true that an employer, faced with significant costs to produce information requested by the union, may seek negotiations with the union respecting the costs involved in information production before undertaking the actual process. In the absence of union participation in such legitimate discussions, the obligation to provide the information may never ripen. The process of negotiations over cost, however, is not a necessary intermediate step predicate to providing all requested information. The issue of costs and the offer to bargain over them is not to be invoked frivolously by an employer nor is the specter of costs to be utilized as a pretext or excuse to unreasonably delay provision of information. Consideration of all of the above factors must be applied to any given dispute with the individual facts and circumstances to the fore. And, since the complaint alleges simply that the information was withheld wrongfully since September 3, 1997, and for an unreasonable time thereafter, it is appropriate to examine the chronology of the Parties communications.

The Union sought the information from Shin, i.e., Boise, first on September 3, 1997. Shin referred the Local to the stores by response of September 11, 1997. Since the Parties had a history of exchanging this type of information at the store level, I find that it was proper for the Respondent to assume that the Union was seeking to continue the practice. I find this action to be reasonable and therefore find the Respondent did not violate the Act in its initial direction of the Union to the individual stores for information.

The Union repeated its information request on September 30, 1997, noting the burden the procedure imposed and adding that it desired a computer print out showing all the requested information. Counsel for the Union made the Union's request crystal clear on October 9, 1997, indicating the Union wanted the information to be supplied to it by the Respondent's "payroll department" and did not want to "be required to go to each store and physically write down this information." That same day, Grimes put Shin on further notice of the difficulties with the Respondent's "go to the store" approach and again requested central payroll information.

Now on unequivocal notice of both the trouble the Union was experiencing following the store-by-store approach and the Union's desire for centralized payroll data, Casey by letter of October 24, 1997, to Rosenfeld, the Union's Oakland, California based counsel, refused to supply information other than at the store level as previously offered. She based her refusal on past practice and on the absence of a single report available

from Boise that would provide the requested information. She also offered:

However, if you wish to meet with me in Idaho to discuss your request to change past practice and explain the reasons why you believe this is appropriate, and to bargain over the costs of information that cannot be readily attained off our company database, I would be more than happy to do so.

The dispute continued unresolved. In a January 7, 1998 letter to Rosenfeld, Shin noted:

In response to you question of what information is available in Boise, the names, addresses, job codes, wage rates and dates of hires for employees can be obtained from a company report.

I once again renew my offer that you meet with me in Idaho . . . to bargain over the costs of information that cannot be readily attained from a company report.

I find that the Respondent's refusal to provide additional information to the Union from its headquarters in the face of the specific requests and arguments of the Union noted above, on and after September 24, 1997, was not reasonable under all the circumstances and therefore violated Section 8(a)(5) and (1) of the Act. I make this finding for the following reasons.

There is no doubt the reasonableness of the Respondent's consistent position, i.e., that the Union must visit each store by appointment and there take an assigned "place to write/work so that you may record the information as they present it to you," must be considered against reasonably provideable alternatives.

The Respondent, both at the time and in defending against these allegations on brief, emphasize the lack of alternatives available to the Respondent at its headquarters. The Respondent holds to the notion that its payroll department, which pays the employees involved, had no means of identifying employees who are covered under the Union's contracts and therefore cannot provide a report as the Union requests. Thus, the Respondent, then and now, argues there was no choice, but to send the Union on site and give them an opportunity to copy down the information that store personnel would "present" to them. The Union challenged the Respondent's claim of headquarters information unavailability—again both at the time and in this action—as absurd and incredible.

Casey's letter to Rosenfeld makes clear what the Respondent's payroll department could at the very minimum generate: "names, addresses, job codes, wage rates and dates of hires for employees." There is no question that the Respondent's store personnel can generate all the requested information. So there is no doubt that the Respondent can generate the information at headquarters or instruct its store personnel to prepare the information in written form store by store and forward it to the labor relations department for compilation and provision to the Union. I find that either of these alternatives or some combination of the two is more reasonable than the method provided and required by the Respondent of visiting over a score of stores often involving multiple visits to individual stores and hand copying from staff dictation and multiple records the information requested.

The provision of large amounts of information which must be recorded accurately—as employee information of the type involved herein clearly is, is most likely to be inaccurately recorded when done so by dictation and hand recordation. The process the Respondent insisted on was not even efficient or efficacious for it own store staff. The store directors and/or bookkeepers were required to participate in the copying process continuously for very substantial periods. The Respondent has made it very clear throughout this case that its store directors and store bookkeepers are very busy people and have many tasks to do throughout the day. While the Respondent argues this supports its requirement that the Union make appointments with store directors and bookkeepers, it more convincingly demonstrates that the system the Respondent would impose on the Union is hard on store staff as well for it commands substantial continuous time periods for them as well as for the Union. And, of course, more time later will be necessary to straighten out the inevitable transcription errors the process is certain to generate. The fact that store directors, in effect, repeatedly called off the information gathering sessions when they consumed too much bookkeeper time, as described above, confirms this view.

The alternatives, generating as much as possible information at headquarters or allowing the store directors or their book-keeping staff, on their own time and pace to prepare the information in written form and submit it to headquarters clearly would be more efficient for store personnel and would, I find on this record, actually consume less time and consume fewer of the store's management resources than the "come and copy while we dictate" procedure of the Respondent.

The Respondent argues that it did not refuse to provide the information centrally to the Union, but rather only conditioned that possibility on the requirement that the Union—at least as stated to the Union's Oakland, California based counsel—come to Boise and bargain about the costs of obtaining this information through the Respondent's systems. On the facts of this case the offer was neither relevant nor a valid defense to the allegations. An employer's right to bargain about costs of gathering information before providing that information arises when unusual or excessive costs of obtaining, organizing, preparing, or disclosing information occur. There is no right for an employer to withhold the disclosing of conventional information in conventional form unless and until the Union bargains over cost. Employer must bear the regular and usual costs of dealing with the Union-including fulfilling normal information requests—as they must bear other costs of doing business. Since there was a conventional way of obtaining and providing the information the Union desired—as is discussed above—the Respondent was not entitled to delay the provision of the information by conditioning its provision on bargaining about the costs of retrieving the information directly from its central data base via unknown but presumably expensive or programming modifications to the Respondents systems. I also find that the costs of generating the information in the manner proposed by the Union was almost certainly significantly cheaper that the costs to the Respondent of supplying the information at the 26 stores in the manner they required.

The Union's request for a central report of these basic employee statistics—not an unconventional or unreasonable request in these automated and centralized times—was not on this record simply a request that the information desired must come from headquarters as opposed to through headquarters. I find that the Union had in effect asked the Respondent to gather the information and supply it from a single collection point to the Union. That request, the Respondent well knew or should have known, could have been satisfied by having the stores prepare in hard copy and submit to the labor relations department the information desired. In refusing to supply the information to the Union in the form and fashion requested, the Respondent was also refusing to direct the stores to prepare and submit the information.²⁰

The Respondent also argued past practice supported the procedure it required. Even if the parties had a long history of providing limited amounts of the type of information involved herein at the store level, on this record there is no showing that the Union had ever been required to go to the store level to obtain the large amounts of data involved herein that represented a complete updating of the entire represented employee data compliment by the Union. In the instant situation every store in the two-State area was involved requiring multiple data entries respecting every one of the roughly estimated one hundred employees per store. The record makes clear that the Respondent directs all the Charging Party labor organizations to stores to obtain limited—usually grievance-related information. I find that is completely different from what was involved here and that the Respondent well knew that this was so once the Union made clear what it was doing and the problems it was confronting. I therefore find that the Respondent's practice defense is not an effective defense save to support its initial referral of the Union to the stores as described above.

The findings and conclusions above may be reiterated in a slightly different way. The information involved here is of the most fundamental kind regarding the employees the Union represents. It is the fundament of representation for a labor organization to know what employees it represents, how to contact them and what their job classifications and wages are.²¹

It is permissible for a Union from time to time²² to request this information and to obtain it without cost from an employer. Further, where the quantum of data makes it unreasonable, the Union may not be required to hand copy individual entries from multiple employer records at the employer's premises or sit in place as such premises and receive dictation—oral delivery requiring hand recordation—of the data involved. Perhaps with very few employees this is permissible. With the 26 stores and the thousands of employees and the many thousands of data entries involved herein, it cannot be reasonably required.

Nor may an employer seek to charge or bargain about costs for the provision to the union of employer prepared, hard copy, reports of the information requested. This conventional information must be disclosed upon union request as a cost of doing business. An employer may not seek to recoup its costs from providing such basic, conventional information. If the costs of the provision in this case sum large, it is because the unit is large, not because the data involved is obscure, exotic, or requires expensive manipulation or presentation. There is no obligation on an employer to set up a particular data retrieval system, centralized or otherwise, for the preparation of such information. But not having a procedure more "modern," or more centralized than having store personnel prepare the information store by store from multiple store-based records and transmit the prepared information to headquarters is not a reason or excuse for not supplying the information or for charging for its more efficient provision.²³ As I have found supra, central provision of the information will be more economical for the Respondent that the alternative it proposed.

The Respondent on this record unreasonably refused to provide the information requested by the Union by unreasonably requiring the Union to visit each store by appointment and to record/copy the very substantial amounts of data needed from the oral recitation and multiple documents presented at each store. Such conduct violated Section 8(a)(5) and (1) of the Act and I so find.

c. Local 394—Complaint paragraph 58

Complaint paragraph 58 alleges:

(a) On various dates including August 8, 24 and September 23, 1996, UFCW 394, in writing, requested that Respondent provide a list, including addresses and telephone numbers, of employees who were employed at Respondent's Rapid City, South Dakota facility.

²⁰ The General Counsel and the Charging Party argue that the letters of Casey respecting what was available and not available at headquarters were confusing and inconsistent. Thus she stated in one letter, as poted above:

In response to you question of what information is available in Boise, the names, addresses, job codes, wage rates and dates of hires for employees can be obtained from a company report.

I once again renew my offer that you meet with me in Idaho ... to bargain over the costs of information that cannot be readily attained from a company report.

This communication they argue does not make clear why the information described in the first paragraph cannot be obtained from headquarters nor does it make clear what cannot be obtained. I find it unnecessary to address that issue given my findings above that the Respondent had a reasonable alternative at hand that did not involve bargaining over costs but refused to utilize it.

²¹ Social security numbers are not similarly situated, but as noted supra, are included here based on other factors unique to the parties past dealings and the record as a whole.

²² There was no issue nor evidence to suggest that the Union had ever previously sought this information for the unit as a whole, let alone evidence it had been seeking the information with unreasonable frequency. Repeated provision of such information would, of course, change the process from one of de novo provision to one of updating an existing data basis or document, substantially reducing the resources consumed by all parties.

²³ There is reason to believe, as described above respecting the Union's experience in one of the stores visited, that store bookkeepers having been apprised of what the Union wanted, could utilize the store's computer system to retrieve at least significant parts of the requested data.

- (b) On various dates including August 28 and September 23, 1996, UFCW 394, in writing, requested that Respondent provide the following information:
- (i) a copy of all correspondence sent to store employees regarding a re-classification of employees from fulltime to part-time status, and a list of employees receiving the above mentioned notification;
- (ii) a complete list of employees that have been reclassified along with wage rates prior to the contract and the current wage rates;
- (iii) a copy of Respondent's policy regarding full-time and part-time employees, in addition to the policy on reclassification from full-time to part-time, and from parttime to full-time:
- (iv) information on the time frame used to determine full-time status for employees at Store 845 in Rapid City;
- (v) a complete list of clerks and the number of hours worked each week individually during the last 52 weeks prior to the decision to reclassify employees;
- (vi) a copy of all work sheets used by Respondent to determine status, along with a list of supervisors involved in the decision to reclassify employees.
- (c) Since about September 24, 1996, UFCW 394, in writing, requested that Respondent provide the following information:
- (i) a copy of the Corporate Pension Plan Document, and all amendments to the plan since July 21, 1995;
 - (ii) a copy of the Corporate 401(k) Plan document;
- (iii) copies of all correspondence sent to Store 845 employees concerning the Pension or 401 (k) plan;
- (iv) minutes of the meeting when the Pension Plan Amendment was discussed and passed, referred to in the August 15, 1996, letter to employees;
- (v) a list of all employees participating in the Corporate 401 (k) plan in 1996;
- (d) Since about December 4, 1996, UFCW 394, in writing, requested that Respondent provide information relating to bargaining unit employees at Store No. 845 in Rapid City, South Dakota including employee names, telephone numbers, social security numbers, phone numbers, rates of pay, classifications, mailing addresses and effective dates for any of the following employment changes occurring at such store:
 - (i) new hires or transfers into the bargaining unit;
- (ii) termination or transfers out of the bargaining unit specifying if terminations were voluntary;
 - (iii) leaves of absence for periods over 30 days;
- (iv) a complete list of employees at Store 845 that were participants in Respondent's 401 (k) Plan at anytime during 1995, and/or 1996;
- (v) copies of all correspondence sent to Store 845 employees concerning participation in the 401(k) plan including options for remaining in the plan or removing money from the plan.
- (e) The information requested by UFCW 394 as set forth above in paragraph 58(a)-(d) is necessary for, and relevant to, UFCW 394's performance of its duties as the exclusive collective-bargaining representative of the Rapid

- City Grocery Unit described above in paragraph 15 and is a mandatory subject for the purposes of collective bargaining.
- (f) Since about August 8, 1996, and for an unreasonable time thereafter, Respondent, by its agents including Christopher Yost has delayed, failed and refused to furnish UFCW 394 with the information requested by it as described above in paragraphs 58 (a)–(d).

(1) Threshold issues

The Respondent raises two threshold defenses to the entire complaint paragraph, which are best addressed initially. The Respondent contends without citation of authority that it had no obligation to provide any information at all respecting the Respondent's 401(k) plan. The Respondent notes the relevant collective-bargaining agreement between the parties recited that the Union "unqualifiedly waiv[ed] the right . . . to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement." The Respondent's 401(k) plan-separate and apart from its pension plan, is not mentioned in the contract. Assuming without deciding that the Union had contractually waived its right to bargain over the terms of a 401(k) plan, an argument not necessarily effective when not raised to the Union at relevant times, the Union is still not foreclosed from grieving-or requesting information regarding grievances—alleging employer discrimination against employees based on a union pension plan.

The Respondent also raises the matter of Local 394's September 16, 1998 request to withdraw the underlying charge made by the Union—and still outstanding—in accordance with a broader settlement between the Respondent and the Local. The General Counsel, initially through the Regional Director to whom the settlement was tendered and thereafter through counsel for the General Counsel herein, opposes the withdrawal/settlement based on the Respondent's history of violations of the Act and its alleged breech of settlement agreements. The parties argue its merits under the Board's seminal case, *Independent Stave Co.*, 287 NLRB 740 (1987), and its four criteria for considering such settlements:

Generally, however, in evaluating such settlements in order to assess whether the purposes and policies underlying the Act would be effectuated by our approving the settlement, the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging part(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching agreement; and (4) whether the respondent engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. [287 NLRB at 743.]

It is important to keep in mind the different standards to be applied in reviewing a settlement agreement initially approved by a Regional Director and thereafter set aside by that Regional Director on the one hand and the instant situation where a settlement is offered for approval which was never approved by the Regional Director who remains actively opposed to such approval. In the former situation, the parties—and the Respondent in particular—have taken actions in reliance on the Government's approval of the agreement. In the latter, current situation, the parties never having obtained approval are not in the same position.

So, too, the standards for setting aside a Board approved settlement and approving a proposed unapproved settlement are clearly different. In considering a set aside settlement, the approved settlement agreement in effect makes irrelevant all presettlement conduct of the Respondent. Only subsequent conduct of the Respondent in breech of the settlement is relevant. Under *Independent Stave* the respondent's history of violations of the Act is a relevant factor in determining if the settlement should be approved. And, of course, the Board emphasizes that the General Counsel's view is to be taken into account.

The Respondent has pressed its motion respecting this and other settlements several times during the course of the litigation. Each time I deferred ruling until I could consider the Respondent's entire course of conduct after having resolved all the allegations of the complaint. Having now determined as set forth throughout this decision that the Respondent in fact has engaged in a significant number of unfair labor practices including violations of the Act similar to those in controversy herein, I find that it is not appropriate to approve the parties settlement or the Charging Party's withdrawal request. I shall therefore turn to the merits of the allegations.

(2) Complaint subparagraph 58(a)

Charging Party Local 394 is a small local with a part-time staff, which came to represent the employees of the Respondent's store 845 located Rapid City, South Dakota, in mid-1994. A contract was reached effective by its terms from July 23, 1996, to September 10, 1998. Local 394's president, Tom Johnson, testified that he was instructed in July 1996, by the Respondent's labor relations contract attorney, Donna Pike King, to file an information request respecting store 845's unit employee names, addresses, and phone numbers with the Rapid City store director, Dan Yeazel. He did so by letter dated August 8, 1996.

Christopher Yost, the Respondent's labor relations attorney for the Rocky Mountain division team, sent a letter to Johnson dated August 19, 1996, which stated: "Per, your request please find enclosed an employee list with addresses for Store #845." A list of names and addresses only—without phone numbers—was attached. Yost testified that he believed that the Respondent was not obligated to furnish the Union with employee telephone numbers in right-to-work States such as South Dakota and that he explained to Johnson that he should obtain the numbers from the employees not the employer.

On August 24, 1996, Johnson replied to Yost asking for phone numbers and noted several employees were omitted from the list. Johnson asked for a complete list with phone numbers. On September 23, 1996, in association with other matters, Johnson wrote Yost reviewing the August 8 and 28, 1996, requests for a complete list of employee names and address and

phone numbers and seeking an "immediate response on the information requested" and production of the information in 10 days. The Union filed the charge in Case 18–CA–14237 on October 15, 1996. Yost supplied the telephone numbers by letter dated November 14, 1996. On December 4, 1996, Johnson wrote Yost, inter alia, seeking addresses for 18 named employees and phone numbers for 4 named employees. There is no dispute that the November 14, 1996 materials supplied by Yost omitted some information. On January 6, 1997, Yost provided this additional information omitting the phone numbers of two individuals who were no longer bargaining unit employees.

Two issues are raised respecting the allegations of subparagraph 58(a): accuracy and timeliness of production. The Respondent argues that the alleged inaccuracies in the employee names and addresses were not as significant as the Charging Party's attempts to characterize it and that Yost was acting in good faith and in the belief that the list was correct when he provided it.

Second, the Respondent argues that the initial withholding of phone numbers was but an initially incorrect judgment that was reversed. The Respondent argues such a temporary error does not rise to the level of an unfair labor practice citing *Crestfield Convalescent Home*, 287 NLRB 328, 347 (1987). In *Crestfield*, the employer had wrongfully withheld a union requested list of current employee addresses for about a month before supplying it. Distinguishing the General Counsel's cited cases holding that subsequent compliance does not cure a bad-faith refusal to supply relevant information, the Board found that the short period of "tardy" compliance in the context of complying with other information requests did not support and inference of bad faith.

The General Counsel and the Charging Party return to their theme that the conduct herein is simply another step in the Respondent's endless dance of delay. They argue that it takes Board charges to stimulate belated and begrudging provision of information and that as here the information supplied is often riddled with errors and omissions.

With respect to this Local Union—see the discussion of additional subparagraphs of complaint paragraph 59, infra—there is, as the General Consul argues, a troubling pattern of initial refusals or omissions, tardy provision of information, and inaccurate disclosures by the Respondent. It is unnecessary to determine if the Respondent's conduct at issue regarding complaint subparagraph 58(a) requests, in isolation, would violate the Act. In the larger context of the conduct respecting all of complaint paragraph 58 and indeed on the basis of the conduct of the labor relations department team serving the Rocky Mountain division, as well as the record as a whole, I find that the Respondent's conduct is a part of a larger pattern of conduct which simply is unreasonable and does not meet the requirements of the Act. Accordingly, I find that respecting the requests of information set forth in complaint subparagraph 58(a) the Respondent's conduct violated Section 8(a)(5) and (1) of the Act as alleged.

(3) Complaint subparagraph 58(b)

On August 28, 1996, Johnson sent a letter to Yost requesting the materials set forth in complaint subparagraph 58(b):

- (i) a copy of all correspondence sent to store employees regarding a re-classification of employees from fulltime to part-time status, and a list of employees receiving the above mentioned notification;
- (ii) a complete list of employees that have been reclassified along with wage rates prior to the contract and the current wage rates;
- (iii) a copy of Respondent's policy regarding full-time and part-time employees, in addition to the policy on reclassification from full-time to part-time, and from parttime to full-time:
- (iv) information on the time frame used to determine full-time status for employees at Store 845 in Rapid City;
- (v) a complete list of clerks and the number of hours worked each week individually during the last 52 weeks prior to the decision to reclassify employees;
- (vi) a copy of all work sheets used by Respondent to determine status, along with a list of supervisors involved in the decision to reclassify employees.

Johnson sent a followup letter again requesting the information on September 23, 1996. On October 15, 1996, Kathryn Bush, contract administrator for the Respondent, sent the Union a letter in part addressing the August 28, 1996 information request:

Regarding your information request dated August 28, 1996, I am enclosing a copy of the following information.

- 1) I am enclosing a copy of the memo dated August 8, 1996, which was sent to employees affected by the two tier wage schedule.
- 2) Below is a list of the employees affected by the two tier wage schedule. . . .
- 3) The company does not have a policy regarding full-time and part-time employees.
 - 4) [Calculation of hours explanation.]
- 5) The payroll histories for the relevant period for all employees classified as clerks are attached. Please see response to #6.
- 6) Enclosed are copies of the payroll histories used to calculate the average hours worked by clerks at store #845.

The submission provided payroll histories for a 26-week rather than the 52-week period requested by the Union. Yost testified he determined that the issue was a matter of contract interpretation and the longer period was not relevant to resolution of the grievance. The submission did not include a July 24, 1996 memo to employees (GC Exh. 189), nor an August 9, 1996 memo (GC Exh. 212). Finally, the submission did not include the requested list of employees who received information from the Respondent respecting changes from full-time to part-time status

Bush testified that she was off work on 3 months maternity leave at the time the August 28, 1996 request was submitted. She testified that upon her return to work she found work had

piled up during her absence. She came to be assigned the information request and prepared and sent the October 15, 1996 letter with attachments described above. She specifically testified the added document, which is part of Respondent's Exhibit 104—the list of 32 employees—was included with the submission to the Union. The General Counsel and the Charging Party advanced General Counsel's Exhibit 197 as the document received by the Union that does not include the disputed page.

On February 13, 1997, Johnson wrote Yost, inter alia, informing him that "[a]fter closer review I have noticed" that he had only gotten 26 weeks' worth of information and not received 52 weeks of employment information and asked again for the information for the full 52-week period. Yost testified he provided the information at a meeting on March 1, 1997. This assertion was challenged by Johnson and Union Counsel Robert Metcalf. Johnson testified he subsequently received the information, but does not recall when he received it.

The allegations involving the request described in complaint subparagraph 58(b) raise issues of the reasonableness of the time taken to initially provide the bulk of information; whether or not the October 15, 1996 Kathryn Bush response contained the disputed list, and the matter of argued delay in provision of the 52-week histories which includes the conflict as to precisely when that information was supplied. Also included are the issues of the nonprovision of the July 24, 1996 memo to employees, the August 9, 1996 memo, and the noninclusion of a list the employees who received information from the Respondent respecting full-time to part-time status information.

Respecting the initial delay in the Respondent's response, the General Counsel and the Charging Party recur to the argument that the Respondent as a matter of policy and plan simply does not reply quickly or even reasonably to the information requests of its Unions. The Respondent, on brief at complaint paragraph 58, page 10, argues:

With respect to the timing of the letter, there was not an unreasonable delay. Bush needed to respond not only to the information request, but the grievance itself. Especially in view of Bush's maternity leave and the great workload that both Bush and Yost were experiencing at that time in the Denver area, the response time of one and one-half months was reasonable.

First, on this record and in this instance, it is simply not reasonable to fail to respond—even to the extent of an informal notification either of staff shortages or of the unusual press of other business, to the information request for 6 weeks. The Union on this record had no indication if, or when, the Respondent would reply and was left in the dark. In such a circumstance the unreasonable delay violates Section 8(a)(5) of the Act. In making this finding I have considered the argument and the evidence in the record as a whole respecting the Respondent's broader issues of "swamping." I will not repeat that analysis here which is discussed at some length earlier in this decision.

The second issue is the completeness of the Respondent's initial response by Bush on October 15, 1966. While there is a dispute respecting whether or not the list of 32 employees was included, there is no dispute in the record that the response did

not provide nor explain the non-provision of the two memoranda of July 24 and August 9 as described above nor the list of employees who received information from the Respondent respecting full-time to part-time status information. The General Counsel suggests that the memoranda were withheld because they undermined the Respondent's position on the grievance. The Respondent's labor relations department attorney, Yost, testified respecting the pension correspondence request that his investigation had revealed no copies of memoranda issued to employees nor a suggestion that memoranda had been sent until much later in the process.

The General Counsel has established the existence of the memoranda, their relevance and their nondisclosure—a prima facie case of a violation of Section 8(a)(5) of the Act. I find the record does not sufficiently explain the absence of disclosure of the July 24 and August 9 documents to rebut the prima facie case. Therefore, I find their omission further violates Section 8(a)(5) of the Act.

The remainder of the omission allegation is the failure to provide 52 as opposed to 26 weeks of employee payroll histories. Yost testified that he did not authorize Bush to release more than a 26-week period because he felt it was not relevant to a determination of who was part time or full time, in as much as the lesser period would serve as well to establish that status. He testified he later provided the information to Johnson because the parties at that point were bargaining respecting the basis for making such classification decision in subsequent time periods.

The Respondent argues that the information was not relevant to the grievance underlying it and therefore there was no obligation to disclose citing Southwestern Bell Telephone Co., 173 NLRB 172 (1968). In the cited case, the Board applied the principle that where there was not "any probability of relevance" (173 NLRB at 172) of the information sought to the grievance at issue. Applying that standard here, I find contrary to the Respondent's argument, that there was at least a probability of relevance of the full 52-week payroll histories to the grievance at issue. It is clear that some period must be used to determine whether or not a particular employee is or was a parttime or a full-time employee. There is no evidence that the contract or other applicable past practice or arbitral precedent controlled or defined the period of time to be used in establishing such status. Thus, there was at least arguable relevance to any reasonable period of time.

Having found the 52-week period payroll histories arguably relevant, I further find the Respondent was obligated to disclose that information to the Union. It mattered not that the Respondent had a different view of the period to be used. Advocates are entitled to great latitude in how they view and advocate evidence in contesting a grievance. The issue here is whether or not the Respondent may limit and control the reasonable views of the Union as to relevance by restricting the Union's access to information outside the Respondent's view of relevance.²⁴ I find they may not. The Respondent's delay in fur-

nishing this information therefore violates Section 8(5) of the Act^{25}

(4) Complaint subparagraphs 58(c), (d)(iv), and (v)

(a) Facts

There is no dispute that on September 24, 1996, the Union wrote Yost and requested in conjunction with an attached grievance²⁶ that Respondent provide the following information which is alleged in complaint subparagraphs 58(c)(i)–(v):

- 1. A copy of the Corporate Pension Plan Document, and all amendments to the plan since July 21, 1995;
 - 2. A copy of the Corporate 401(k) Plan document.
- 3. Copies of all correspondence sent to Store 845 employees concerning the Pension or 401(k) plan.
- 4. Minutes of the meeting when the Pension Plan Amendment was discussed and passed, referred to in the August 15, 1996, letter to employees.
- 5. A list of all employees participating in the Corporate 401(k) plan in 1996.

By letter, dated December 4, 1996, to Yost, Johnson restated two requests which are the requests alleged in complaint sub-paragraphs 58(d)(iv) and (v):

A complete list of employees at Store 845 that were participants in the Company 401(k) Plan at any time during 1995, and/or 1996.

Copies of all correspondence sent to Store 845 employees concerning participation in the 401(k) Plan. This shall include options for employees with regards to remain[ing] in the plan, or to move money from the plan.

On November 14, 1996, Yost sent the Union a response. The packet with a cover letter supplied the pension plan and 401(k) documents requested in the Union's September 24 requests 1 and 2. Respecting request 3, the request for correspondence, the packet contained an August 15, 1996 announcement to employees. Yost testified that he could discover no other copies of correspondence nor at the time did he believe that any additional correspondence was ever sent employees. Respecting request 4, the packet did not contain any minutes of

the Respondent's own investigation of the grievance at issue, the Union was not entitled to the information because it was not relevant, is a recurrent one. See discussion, infra.

²⁵ Johnson testified he did not recall when the information was finally given to him. The Respondent, through Yost corroborated in some regards by Bush, identified the date of disclosure as on March 1, 1997. The General Counsel has the burden of establishing all elements of the complaint. Since Johnson could not identify the time of production with specificity and, since there is no issue, disclosure did not occur until March 1, 1997, I shall find a violation to that point but no further. Given this finding it is unnecessary to further resolve the dispute respecting the specifics of disclosure or the conflicting testi-mony regarding the events of March 1, 1997.

²⁶ The grievances alleged: (1) that on September 5, 1996, the Respondent wrongfully terminated store 845's employees participation in the Respondent's 401(k) plan and (2) that on or about August 15, 1996, the Respondent announced a change in the corporate pension plan for employees who have both a union and corporate pension plans—which change was not bargained with the Union.

²⁴ The position of various of the Respondent's labor relations department professional staff that, if the Respondent was uninterested in or had not relied on the information that the Union was requesting in

the meeting where the Pension Plan Amendment was discussed. Yost testified no such meeting was ever held so no minutes existed. Finally, the packet did not contain a list of all employees participating in the corporate 401(k) plan. Yost testified he construed this request to deal with Respondentwide participation and felt the request was simply irrelevant, overbroad, and burdensome. He also testified that he had informed Johnson of his view of this request perhaps a month after it was received. Johnson denied that this was so and testified that the Respondent never directly communicated with him respecting his request. Rather, Johnson testified he heard of the Respondent's broad interpretation of the Union's request for a list of employee participants in the 401(k) plan as calling for a companywide listing only through conversations with the Board agent investigating the charge.

Johnson sent a followup letter to Yost on December 4, 1996, in which he sought the complete list of store 845 employees that were participants in the 401(k) plan in 1995 and 1996 and also sought correspondence sent from the Respondent to employees respecting options for employees to elect to remain with or to withdraw money from the 401(k) plan. Yost on January 6, 1997, sent Johnson a list of store employees who were in plan in 1995, and 1996,—at least as it had been prepared by his employee benefits department and, as he testified, he believed was correct at the time. Johnson by letter of January 20, 1997, pointed out that the employee list supplied was for "eligible" rather than "participating" employees and complained he had not been given the correspondence which the Respondent had sent to employees regarding what options employees were given in addition to the notification they received.

On February 3, 1997, Yost wrote Johnson in effect indicating he had correctly provided all the information requested on January 6. Johnson responded on February 10 standing by the position taken in his last letter. Johnson was in fact correct that the list sent him was not a list of participants but rather of the larger class of eligibles. Yost testified that when he came to realize that the list was incorrect—without placing a date on the discovery—he provided the correct information to Johnson. At the trial Johnson testified that he had still not gotten a list of "participating" employees in the 401(k) program. At the May 1, 1997 meeting, additional documents about which there was substantial dispute respecting their content were provided the Union along with an explanation of the events under challenge in the grievance. The grievance was withdrawn.

(b) Analysis and conclusions

The General Counsel and the Charging Party argue that the Respondent violated the Act in several particulars respecting these information requests. First, the General Counsel and the Charging Party argue the initial response of the Respondent—even to the extent it was responsive to the information request—was unreasonably delayed, i.e., the time from request to reply ran from September 24 to November 14, in essence 3 weeks. Since the initial response supplied all requested information alleged in complaint subparagraphs 58(c)(i) and (ii), this theory of violation is the sole contention of the Government respecting these allegations. The Respondent reprising arguments discussed above, argues the response time was reason-

able given the press of business and the need to determine the existence of, locate, and gather up the entire set of information rather than just these documents.

Although the issue is a close one given the pattern of negligent conduct discussed infra. I agree with the Respondent that given the broader request and the need to consider more than just the disclosure of these two requests, the delay was not so unreasonable as to violate the Act respecting the materials disclosed in the initial reply. While the Respondent could have sent these items under separate cover and avoided any delay caused by addressing the other elements of the request, I find that the Respondent could well have found it preferable to respond to all elements of the request at one time. In reaching this finding, I rely on my separate conclusion, discussed at length in the remedy section of this decision and elsewhere, that the General Counsel has failed to establish that the Respondent was embarked on a wide ranging course of conduct or pattern and practice of deliberate calculated delay and obfuscation that supported a finding that each and every delay in production of information was deliberate, unreasonable, malign, and a violation of the Act.²⁷

The defense to the failure to disclose to the Union the information requested respecting the "minutes of the meeting when the Pension Plan Amendment was discussed and passed, referred to in the August 15, 1996 letter to employees" alleged in complaint subparagraph 58(c)(iv) is simply that no such meeting took place and therefore no minutes exist. The General Counsel and the Charging Party emphasize that Yost did not inform Johnson there were no such documents rather his written communications simply did not address the request. They argue that, even were it the case that the meeting did not occur and no minutes were thus ever created, the Respondent was obligated to disclose that fact and by remaining silent when it easily could have disclosed its view, failed to properly respond to the request at any material time. This misleading omission they argue is a violation of the Act just as the wrongful withholding of affirmative information because it has the effect of misleading the Union respecting facts relevant to the grievances filed and preventing it from properly and timely determining the complete circumstances respecting the grievances filed citing Postal Service, 332 NLRB 635 (2000). I agree and find the Respondent's failure to address the request other than by silent nondisclosure violated Section 8(a)(5) of the Act. I note further that this is but one incident in a pattern of similar conduct that recurs through the allegations herein.

The information requests described in complaint subparagraphs 58(c)(iii), (d)(iv), and (v) deal with provision of erroneous or incorrect information. Although the issue is a close one given the history involved, had the information supplied by the Respondent to the Union on November 14 in response to these requests been correct, no violation of the Act as alleged in these sub-paragraphs would have occurred. I have found the timing of disclosure not fatally unreasonable, supra. However as to

²⁷ My finding here deals with the Respondent's conduct as deliberate, calculated behavior supporting a plan or scheme not the different category of negligent, or unreasonably delayed or nonresponsive conduct.

both requests, the Respondent supplied insufficient and erroneous information on that date which provision I find unreasonable under all the circumstances and violative of the Act.

Respecting the request for copies of all correspondence sent to store #845 employees concerning the Pension or 401(k) plan alleged in complaint subparagraph 58(c)(iii), the Respondent's November 14 submission was admittedly incomplete. Respondent, primarily through the testimony of Yost, defended its disclosures as undertaken in good faith and that the fact of the Respondent's communications with employees was simply not known by Yost and it had been reported to Yost by the relevant headquarters departments that there were no copies of any such communications. The General Counsel and the Charging Party urge that this testimony be discredited, but I decline to do so on this record given the credibility of Yost respecting this testimony. I find his disclosure was consistent with his belief at relevant times and that there is insufficient evidence the Respondent made a negligent effort to meet the request. Accordingly as to the information request described in complaint subparagraph 58(c)(iii) I find the Respondent has not violated the Act.

The situation respecting the request described in complaint subparagraphs 58(c)(v) and (d)(iv): the list of all employees participating in the corporate 401(k) plan in 1996—later expanded to employee for the period 1995-1996, presents two issues. The General Counsel and the Charging Party argue that Yost's initial response respecting the requested information did not provide nor explain the nonprovision of this information. As to Yost's testimony that he did not provide the information initially because he believed the request sought a list of all of the Respondent's employee participants and that such a request was unreasonably overboard, the Government makes two arguments. First, the General Counsel and the Charging Party argue that Yost's alleged reading of the request is incredible and should be rejected as simply prevarication. Second they argue that, even were this testimony credited, Yost's silent, unexplained nondisclosure respecting the request is a violation because the Respondent was under a duty in such a circumstance to either inquire of the Union respecting the breadth of its request or at the very least to give a rationale for its refusal to provide the information.

I do not find Yost's testimonial explanation that he believed the request was employerwide to be so unreasonable that I should discredit Yost and find the Respondent simply prevaricated and in fact withheld the information in bad-faith seizing on the offered interpretation of the request as a pretext to shelter its true motive. I do however find that the Respondent's simple omission to respond in anyway to the request, simply not providing the information or further dealing with or explaining the rationale for the November 14, 1996 nonprovision of information, was unreasonable and violated Section 8(a)(5) of the Act. Communication of the Respondent's reasoning when it does not intend to provide information requested by the union is required under these circumstances.

As described above, the Union renewed and expanded its request as alleged in complaint subparagraph 58(d)(iv), making it clear to the Respondent that the class of employees involved was storewide rather than employerwide. The list was provided

by the Respondent, challenged by the Union as erroneously including "eligible" employees as opposed to "participating" employees, once again defended by the Respondent as correct and, finally at a later time, discovered to be in error as the Union contended. The General Counsel and the Charging Party argue once again that the original erroneous list and the maintenance and defense of the list in the face of the Union's repeated efforts to point out its fundamental errors were unreasonable and a violation of the Act. The Respondent as before pleads good-faith and nonnegligent errors.

Unlike my conclusions respecting the Respondent's errors in its response to the complaint subparagraph 58(c)(iii) request, I find the initial disclosure's errors and the maintenance and defense of the erroneous document in the face of the Union's correct analysis of the Respondent's mistake is tantamount to continuing nondisclosure and violates Section 8(a)(5) the Act for several reasons. First, the entire course of conduct respecting the Respondent's responses to this request informs each of the elements in contention. Having been found to have violated the Act by not explaining its reasons for not providing the "participating employees" list in its initial response to the Union's request letter, the Respondent was under a clear duty to "get it right" thereafter and may not simply rely on assertions of error and confusion as might be sufficient in other settings and circumstances. Second, the error offered in defense of its conduct by the Respondent was not a simple error, but rather one which was defended in the face of and despite repeated accurate union complaints. While the initial error, had it been manifested in a context free from the continued violation described here, might have passed statutory muster, the failure to initiate a sufficient investigation to uncover the error and to correct it in the face of the Union's efforts was, I find on this record even were it in isolation, unreasonable and a further violation of Section 8(a)(5) of the Act. I therefore find violations with respect to the requests alleged in complaint subparagraphs 58(c)(v) and (d)(iv).

The Respondent here and in other settings has repeatedly been arrogant in its presumption that the requesting Union is wrong. In response to requests it thinks are in error, the Respondent simply refuses to communicate its views and or maintains that opinion tenaciously without taking proper and reasonable care to insure it is correct. Such conduct is not a violation of the Act when the Respondent's beliefs regarding the relevant facts and law are correct. When the Respondent is incorrect however, its mistaken conduct may not fairly be regarded as reasonable.

(5) Complaint subparagraphs 58(d)(i), (ii), and (iii)

(a) Facts

President Johnson wrote Yost on December 4, 1996:

Please provide us with employment changes at store 845 in Rapid City, South Dakota. You should consider this an ongoing request for information. We would request the following information within ten days of the following occurrences:

1.) New hires, or transfers into the bargaining unit.

- 2.) Terminations or transfers out of the bargaining unit. Terminations should be stated if they were voluntary.
- 3.) Leave of absences granted for periods over 30 days.

Yost in a letter, dated, February 3, 1997, to Johnson, responded to various matters and included the following paragraph:

The information you requested on December 4,1996, regarding employment changes at store #845 can be obtained at the store. Please contact Randy Stewart to arrange a mutually convenient time to obtain this information. If you have any problems obtaining this information, please let me know.

Johnson wrote Yost on February 10, 1997, the letter included the following paragraph:

In the request concerning employment changes in the bargaining unit, you have directed me to Store Director, Randy Stewart. I have discussed our request with Randy and he is working on how to provide the information on an ongoing basis as requested. Your letter of February 3, 1997, mentioned setting up a convenient time to obtain this information. I did want to make clear that this is an ongoing request for changes, and that this is not a one-time request.

It is clear that Johnson made several trips to the store and that he and Stewart had several discussions regarding the information. Stewart testified he sought and obtained time from Johnson to investigate and determine if a good source of the information was available and was unsuccessful in that search. Ultimately, failing to find a single source, Stewart met with Johnson some "days or weeks later" and in Johnson's presence assembled the information sought from various sources and gave it to Johnson. Johnson testified that he continued to deal with the store manager and that it ultimately was "a couple of months" before he obtained the requested information. Subsequent updating has been handled in essentially the same manner by the store manager and the store shop steward without apparent difficulty. Yost testified that he never received a complaint from Johnson after sending the letter referring him to the store.

(b) Analysis and conclusions

The General Counsel makes a two-part argument respecting the Respondent's alleged delays in handling the December 4, 1996 request of Johnson encapsulated in complaint subparagraphs 58(d)(i), (ii), and (iii). First, the General Counsel argues that the Respondent through Yost just ignored the information request for 2 months and then, utilizing the device of the referral of the Union to the store manager as the source of the information, delayed an additional 2 months. The Government and the Charging Party argue that this delay is not reasonable and violates Section 8(a)(5) of the Act.

The Respondent argues that the period of time between the initial request and the reply of Yost was reasonable because the request was not for a report respecting all employees but rather an ongoing request for future employment changes. Thus, the Respondent argues that since the Government has not established when the first reportable change in the requested information occurred, there is no way of determining when the Re-

spondent should have disclosed that information. Respecting the second period of time at issue, the time following Yost's referral of Johnson to Store Director Stewart, the Respondent argues that neither the efforts of the store manager to locate a good source of information nor the time it took to determine there was no such source were deficient and nor was the time necessary to provide the information by assembling it from multiple sources unreasonable.

The Respondent's defense to the delay between the request and Yost's reply—from December 4 to February 10—over 2 months is ingenious, but not persuasive. Yost did not provide information or suggest that there was no rush to do so in light of the "update" nature of the information requested, rather he directed Johnson to the store. Such an action—a simple redirection—should reasonably take far less than 2 months to consummate. Second, I find the size of the bargaining unit is such on this record that change is statistically inevitable and that the Union could reasonably expect reported updates more often that every 2 months. Further, at no time during the information requests life and pending fulfillment did the Respondent's agents, Yost or Stewart, raise the argument the Respondent does here.

Respecting the latter period during which Stewart met with Johnson and told Johnson he would have to get back to him, there was no suggestion that the Union contributed to the delay. The Respondent's argument that the Union did not complain to Yost or to Stewart and therefore may not claim the Respondent acted unreasonably, is not a defense where a 2-month delay is involved. The information the Union sought is not exotic. Stewart testified, and his subsequent procedures with Johnson and the store job steward demonstrated that the information was obtainable—even if from multiple sources—over a relatively brief period. Therefore no objective reason exists which prevented the Respondent from providing the information in a much more timely manner. Based on the record as a whole I find the Respondent's "store based" delays in providing the information were also unreasonable and violated Section 8(a)(5).

d. Local 44—Complaint paragraph 61

Complaint paragraph 61 alleges:

- (a) Since about September 26, 1996, UFCW 44, in writing, requested Respondent to furnish UFCW 44 with the following information relating to Respondent's Stores #416 and #488 in Bellingham, Washington:
- (i) name of each employee showing job classification and wage rate;
 - (ii) employee date of hire;
 - (iii) employee seniority date;
- (iv) total number of hours paid per week, exclusive of holiday and vacation hours, for each employee in each job classification;
- (v) the number of overtime hours paid each week in each job classification.
- (b) The information requested by UFCW 44 as described above in paragraph 61(a) is necessary for, and relevant to, UFCW 44's performance of its duties as the exclusive collective-bargaining representative of the

Whatcom Meat/Grocery Unit described above in paragraph 19 and is a mandatory subject for the purposes of collective bargaining.

(c) Since about September 26, 1996, and for an unreasonable time thereafter Respondent, through its agents including Donna Adams Pike (a/k/a Donna Pike King) has delayed, failed and refused to furnish UFCW 44 with the information requested by it as described above in paragraph 61(a).

(1) Facts

Local 44 has represented employees in Whatcom County, Washington, including the employees of two of the Respondent's retail stores during the time they were under a collective-bargaining agreement in effect from March 31, 1996, into April 1999. Business Representative Michael Hatfield testified he determined in September 1996, to check the application of contractual seniority at the Respondent's two stores. In consequence, he caused his Local president, Pat Finn, to send Dona Pike King, the Respondent's labor relations department contact for his area, a letter dated September 26, 1996, captioned: "Requested Employee Information" asking for the following information for the period August 4 to September 1, 1996, for the two stores covered by the contract:

- 1. Name of each employee showing job classification and wage rate;
 - 2. Employee date of hire;
 - 3. Employee seniority date;
- 4. Total number of hours paid per week, exclusive of holiday and vacation hours, for each employee in each job classification;
- 5. The number of overtime hours paid each week in each job classification.

On October 21, 1996, King wrote Finn acknowledging the request and asserting the information was available in the stores. She wrote that "as in the past" Finn's business agents should contact the store directors to arrange a convenient time when they could supply the information. King's letter indicated: "[W]e will provide the name, social security number, rate of pay, date of hire, store location and classification for each bargaining unit employee." Finn wrote back on October 23, 1996, pointing out that the Union's original request letter sought more and different items than King's letter said would be provided including total hours paid, date of hire, and classification. The letter noted that Finn has asked Hatfield to schedule appointments with the stores to obtain the requested information

Hatfield made an appointment with Jim Ellis, the director of store 488 in Bellingham, Washington, and confirmed the appointment in writing by letter dated October 25, 1996, in which he enclosed the letters between the parties on the matter described above. At the appointed time on October 30, 1996, Hatfield met with Ellis. Ellis in Hatfield's memory, announced that the two would follow a procedure in which Hatfield would ask Ellis a question orally and Ellis would answer orally. Hatfield seeing that Ellis was referring to several dozen documents, told Ellis that he wanted the documents rather than dictated

answers that would be time consuming as Hatfield recorded the information. Ellis declined to share the documents with the Union asserting they had proprietary information. Hatfield countered that the documents could be redacted of all information not relevant to the Union's requested information. The parties could not agree. A labor relations department contract administrator, Karen Freckleton, was contacted and the dispute reprised without the Respondent's position nor that of Hatfield changing. Hatfield left the store without obtaining any information. Hatfield a few days later met with the Store Director Jim Elders of store #488, the other represented store involved. Essentially the two repeated the contretemps of Hatfield and Ellis. Positions had not changed, the scenario was identical to the occurrence at the other store and once again Hatfield left without obtaining the information.

King wrote Finn on November 5, 1996, with copies to the two store directors involved. The letter stated:

In response to your letter dated October 23, 1996, in my letter of October 21, 1996, I intended that Albertson's would make available to your local which would allow your local to calculate "the total number of hours paid per week . . ." and "the number of overtime hours paid each week. . . ." We'll make information available to you at the store level or gather the information if you agree to pay our costs to do so. We anticipate that the cost will be approximately \$200. If you want to discuss this cost, please contact me promptly.

Also please understand that some documents that we make available to your local for purposes of providing information may not be copied or removed from our premises because the documents contain information that you haven't requested and/or are proprietary.

Hatfield responded by letter dated November 12, 1996, in which he asserted that he had already been to the stores and been denied access to the information requested. "I was told by store management I could hand-write the information given but would not be allowed to reproduce any documents." He continued:

Additionally, at each store I offered to pay for the costs of reproducing any/all documents requested. I further offered to personally make the copies at store level. My estimate of the number of copies necessary was approximately 25–30 pages at each store. I fail to understand the basis for which you estimated a copying cost of \$200. Please supply our office with a detailed cost breakdown of your firm's justification for the \$200 figure. Concerning your remarks about proprietary information, you should be aware that at each store meeting, I told each store manager to block out, white out, magic marker or cut out any information that wasn't germane to our request.

On January 15,1997, following the Union's filing of the underlying charge, King wrote Finn agreeing to provide copies of the documents at issue with copying costs equal to those charged the public and confidential and/or nonresponsive information blacked out on copies given the Union. Hatfield testified that soon thereafter he went to the two stores and ac-

complished all the needed copying at an estimated cost of under \$20.

(2) Analysis and conclusions

Before turning to the most frequently contested issue of the parties in the information cases herein: the reasonableness of the Respondent's response to the request for information, the Respondent raises a threshold issue. The Respondent argues the information sought was not necessary or relevant to the performance of the Union's representational duties. The Respondent focuses on the last two of the five categorical requests which seek the total number of hours paid per week, exclusive of holiday and vacation hours, for each employee in each job classification, and the number of overtime hours paid each week in each job classification, Union Business Agent Hatfield testified respecting the fifth category that the Union wanted to "see who was working the overtime" and President Finn testified that the fourth category was requested to check the percentages of work allocated contractual classification and to see if seniority was properly applied. The Respondent argues that the information in the form requested does not exactly match the contractual provisions of the contract and therefore is not relevant to determining if a contract violation has occurred. The Respondent argues that the information request was therefore unjustified and there was no obligation to provide nonrelevant information.

I reject the Respondent's argument that the Union's requested information must be in the precise form the contract describes to be relevant for use in a contractual performance grievance or arbitration or to determine if the contract had in fact been violated. The information sought concerns the specifics of the terms and conditions of employment of represented employees: the hours they worked and the wages and overtime wages they received. The Union need not go further to establish the relevance of the information to its duty to represent employees. I find all the requested information relevant in the sense that the Respondent was obligated to provide it to the labor organization that represents the employees at issue. If a contract allows an employer to pay employees at or over scale, that fact does not make information of the amounts paid to employees irrelevant to the representing labor organization because the amount paid employees could not be a contract violation as such. The Union did provide sufficient and credible theories general of relevance beyond the close parsing of contractual violation relevance. The Respondent may not hold the definition of relevance to its own narrow view.

From the date of the initial request, September 26, 1996, to the Respondent's October 21 direction of the Union to the stores, up to the visit to the stores in late October and early November is a bit over 1 month. Had the store visits provided the information requested, on this record I would not find that the furnishing of the information was unreasonably delayed in violation of the Act. I also do not find the misalignment between the requested information to the information King initially wrote would be provided was more than a simple error. It is therefore unnecessary to consider the arguments of the Respondent that King was overworked, writing letters on the fly, and having them signed and sent by clerical staff.

The heart of the allegation in my view is the question of whether the offer to provide the information at the stores—essentially in oral dictation form—constitutes a reasonable offer under all the circumstances and satisfies the Respondent's duty to provide the information. If it was, the Union's refusal to accept the terms offered is of no moment and the complaint allegations will be dismissed. If the offer was unreasonable and the Union's action in refusing the tender was reasonable, then there was no true adequate, timely, or legally sufficient offer made. It is appropriate then to turn to the offer of the Respondent to provide "dictation" of the information at the stores which in certain ways is similar to the offer discussed in the analysis and conclusions section respecting complaint paragraph 74, supra.

The information requested by the Union which the Respondent offered to provide orally for transcription by hand required the listing of each employee's correctly spelled name followed by additional entries for job classification, wage rate, date of hire, seniority date, as well as an entry for each week of the 4-week period for number of hours paid and one for each week of the 4-week period for the number of overtime hours paid. Thus, the total entries to be made—ignoring the fact that not every employee may have been paid in each of the weeks in question or received overtime, per employee is approximately a dozen. Assuming 100 unit employees per store, the general size of the bargaining units in this record at least by order of magnitude, the information request involved here almost certainly involved over 1000 independent information entries and may have involved substantially more.

Without reprising the discussion under complaint paragraph 74, supra, the oral dictation and hand transcription of such voluminous information is surely not a protocol designed for any participant's comfort, or for transcription accuracy or efficiency in general. The nature and volume of this process at issue is a completely different proposition than the recurrent onsite "updating" or recordation only of changes to a prerecorded and presumably preprinted table or list that the Respondent refers to as constituting the past practice of the parties in this regard. I find in agreement with the General Counsel and the Charging Party, on this record respecting these events and circumstances, that the offered protocol was unreasonable and could reasonably have been refused by the Union.

Conversely, the alternative proposed by the Union, the examination of and copying of redacted copies of the Respondent's source documents was reasonable. Indeed in the final event it proved to be simple, economical, and efficacious. While there may have been other protocols and procedures which would have served, the Union sought that described herein and the Respondent having offered no reasonable alternative, must justify its substantial delay in acquiescing in the protocol proposed by the Union.

The request was first made on September 26, 1996. The final disclosure was consummated on or about the latter half of January 1997. The Respondent has established no viable justification for the delay. The offer of the unreasonable protocol is not an excuse nor does it mitigate the delay. The delay was unreasonable. The Respondent therefore in so delaying the

provision of the information in a reasonable form violated Section 8(a)(5) and (1) of the Act and I so find.

e. Local 373—Complaint paragraph 70

Complaint paragraph 70 alleges:

- (a) On about March 5, 1996, UFCW 373, in writing, requested the following information involving Stores # 781 and #772 concerning employee Linda Barba:
 - (i) hire date;
- (ii) classification on the date she was promoted to Front-End Manager at #772;
- (iii) rate of pay at the promotion date and while at #772;
 - (iv) job status, either full-time or part-time;
- (v) a schedule of all hours worked from date of promotion to return to #781;
 - (vi) current job classification at # 781;
 - (vii) current status, full time or part time at #781;
 - (viii) current rate of pay at #781;
- (ix) schedule of all hours worked from transfer to #781 through present.
- (b) On about March 6, 1996, the Union in writing amended the information request set forth above in paragraph 70(a) and requested duplicate card reports for all food clerks in both Stores #772 and #781 for the same period of time stated therein.
- (c) On various dates including on April 9, 16, 23 and May 8, 9, 16 and 22, 1996, UFCW 373 orally renewed its request for the information set forth above in paragraphs 70(a)–(b).
- (d) On about May 28, 1996, UFCW 373, in writing, requested that Respondent provide "duplicate card reports" for all part-time food clerks working at Store #781, for the weeks ending May 4, May 11, May 18 and May 25, 1996
- (e) On about June 5, 1996, orally and on about June 10, 1996, in writing, UFCW 373 requested that Respondent provide "duplicate card reports" for all part-time food clerks working at Store # 781 for the entire months of April and May 1996.
- (f) The information requested by UFCW 373, as described above in paragraphs 70(a)—(e) is necessary for, and relevant to, UFCW 373's performance of its duties as the exclusive collective-bargaining representative of the Solano/Napa Clerks Unit described above in paragraph 26 and is a mandatory subject for the purposes of collective bargaining.
- (g) Since about March 5, 1996, and for an unreasonable time thereafter Respondent through its agents including Benjamin Swanson and Darryl Smith has delayed, failed and refused to furnish UFCW 373 with the information requested as described above in paragraphs 70(a)–(e).

(1) Initial facts

Local 373 is a local based in Vallejo, California, which represents certain employees of the Respondent in Solano and Napa, California, including employees at stores #772 and #781. Union Representative Eric Brooks in February 1996 learned

that a recently hired employee, Linda Barba, had been promoted from a part-time bakery clerk at store #781 to a front-end manager at store #772. Shortly thereafter Barba has been transferred back to store #781 in training for a front-end manager position. Employees were complaining that Barba was receiving hours of work in excess of part-time status employees' entitlement.

The Union through its then President Dennis Warde by letter of March 5, 1996, to Benjamin Swanson, contract administrator in the Respondent's labor relations department, filed a grievance and made an associated information request. He amended the information request by an additional letter the following day and by oral requests of subsequent days and in writing by letter of May 28, 1996.

By letter dated April 10, 1996, Swanson replied to Warde noting multiple phone messages left asking Warde to call him. The letter asserts in part:

In response to your information requests of March 5, I would be happy to provide you with any relevant information to assist you in investigating your grievance. However you grieved the promotion of Linda Barba [underlining in original] and Ms. Barba is not currently the Front End manager. Therefore, prior to me collecting the items you have requested, please explain why you feel your information request is relevant to the grievance.

On April 23, 1996, in a telephone call covering several matters, the Respondent agreed to provide the information. In early May, some, but not all, the information was supplied. Various communications were exchanged over time with the union unsatisfied.

The Union filed charges respecting the information request with Region 20 on July 8, 1996, in Case 20–CA–27340 (later renumbered to Case 27–CA–15677–17). The Region and the Respondent entered into an informal settlement agreement signed by the Respondent on November 7, 1996, and approved by the Regional Director on November 22, 1996. The Charging Party neither joined nor sought review of the unilateral settlement which provided, inter alia, for posting at the two stores of a remedial notice and contained assurances by the Respondent respecting future conduct.

The settlement agreement contains the specific assurance that the Respondent would comply with all the terms and provision of the Notice to Employees. The Notice to Employees, inter alia, notifies the Respondent's employees that it:

Will not do anything that interferes with employees rights under the Act.

Will not fail or refuse to bargain in good faith with UFCW Local 373, by failing and refusing to promptly furnish the Union with all the information it requests which is necessary and relevant to the unions performance of its duties as the representative of employees.

Will, upon any future requests, promptly supply the Union with complete and competent information relevant to the performance of its duties as the exclusive representative of employees.

Will not in any like or related manner interfere with restrain or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act

The notice to employees was posted and the case was thereafter closed by the Regional Office. No subsequent charges have been filed or are part of this complaint respecting the two stores involved or Local 373 save as part of nationwide or statewide rule recissions. As part of the complaint in this matter the General Counsel set aside the settlement agreement and seeks ratification of that action and consideration of the allegations underlying the settlement on their merits.

(2) Consideration of the settlement agreement issue

A settlement agreement, as the General Counsel and the Charging Parties advocate herein, may be set aside if the Respondent commits substantial and not isolated postsettlement unfair labor practices. The General Counsel argues that the Board uses a "totality of the circumstances" analysis to determine if subsequent unfair labor practices are sufficient to warrant setting aside a particular settlement agreement citing *Oster Specialty Products*, 315 NLRB 67 (1994), and *Deister Concentrator Co.*, 253 NLRB 358, 359 (1980). The question for resolution is what is a "substantial" as opposed to "minor" or "isolated" unfair labor practice.

In arguing that noncompliance has occurred as a result of subsequent unfair labor practices, the General Counsel points to the similar conduct of the Respondent as alleged in the complaint to be violations of the Act concerning Locals 394, 44, and 7 on, or about the time the settlement agreement was being entered into in November 1996, and the later similar conduct alleged in the complaint to constitute violations of the Act respecting Locals 7, 1167, 135, and 368A.

At the onset the Respondent argues that the General Counsel is foreclosed as a matter of law from going beyond the relationship and conduct of the Respondent concerning the Local and the stores involved in the settlement agreement at issue. The Respondent notes there is no contention of postsettlement misconduct respecting the two stores at issue or even respecting its relationship with the Local in every respect. Therefore argues the Respondent no relevant misconduct has even been alleged and the settlement should be reinstated.

The issue here is the "reach" of the assurance by the Respondent in the settlement that:

Will not in any like or related manner interfere with restrain or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

If that assurance has been contradicted by subsequent violations of the Act then the settlement was properly set aside. If there have been later violations of the Act the issue is their applicability to the settlement agreement. If the other conduct found to violate the Act following the approval of the settlement agreement is too far a field, then the settlement agreement has not been violated, the Regional Director's action in setting it aside is unsustainable and the settlement agreement will be reinstated.

I find the applicability of the Board's requirement that postsettlement unfair labor practices be substantial and not isolated as applied to the instant settlement involves considerations which are essentially the same as the issue discussed in the remedy section, infra, of whether or not a broad remedy incorporating all the violations of the Act found in the complaint, or at least all the "information" violations, and including the instant allegations, is appropriate. Put another way: Has the General Counsel established that the postsettlement information unfair labor practices found herein are so "like and related" to the allegations involved in the instant settled case that the postsettlement violations as the other locations noted are properly considered as conduct inconsistent with the settlement agreement?

The Government seeks a remedy which includes the Respondent posting a notice at all Western Region facilities including the two stores at issue herein and which notice will give assurances not significantly different from those posted under the terms of the settlement agreement at issue here. If that is appropriate, surely it would also be appropriate to find the unfair labor practices committed by the Respondent that support and justify that notice posting at the Respondent's stores #772 and #781 are not isolated and justify the setting aside of the settlement. This being so, it is appropriate to consider the remedy directed herein insofar as it requires actions to be taken at these two stores located in the Respondent's northern California division, a subunit within its western region.

Without duplicating the analysis and consideration set forth in the remedy section at some length, and acknowledging the issue is both close and difficult and could easily be reversed on review, I find that the violations found in the instant proceeding are not so related that a single common regionwide remedy should be directed. Setting aside the commonalties found respecting the Respondent's Rocky Mountain division and violations of the Act other than information cases, I have found in the remedy section, infra, that non-Rocky Mountain division information cases are appropriately viewed as separate and apart from the Rocky Mountain division cases and that neither the entire body of violations found herein nor the entire body of information cases found herein are not properly treated as a like and related or single course of conduct. Thus, I have not ordered a western regionwide remedy. There shall be no remedy directed at stores #772 and #781 for information violations that were found to have occurred at other stores. The California State and Nationwide rule violations will require posting at their facilities, but are in my view isolated fro the allegation at

That being so, I do not find the relationship necessary between the subsequent "other conduct" offered by the Government as inconsistent with the settlement agreement and the conduct underlying the instant allegations and the assurances given in the settlement agreement to find the Respondent breached the settlement agreement through that other conduct.

Having found that the Respondent did not violate the terms of the settlement agreement, I find it was not properly set aside and shall reinstate the settlement agreement. The reinstatement of the settlement agreement ends any consideration of the allegation of the charge and precludes further consideration of the complaint allegations based on the settled charge in Case 27–CA–15677–17. Accordingly, I shall dismiss paragraph 70 of the complaint.

f. Local 1167—Complaint paragraph 72

Complaint paragraph 72 alleges:

- (a) On various dates including on February 4, June 18, and July 17 1997, in writing, and on April 10, May 16, and September 12, 1997, orally, UFCW 1167 requested that Respondent provide the actual weekly time punches of employee Mauricio Andrade at Store # 954 for the period September, 1996, through January, 1997.
- (b) The information requested by UFCW 1167 as described above in paragraph 72(a), is necessary for, and relevant to, UFCW 1167's performance of its duties as the exclusive collective-bargaining representative of the California Grocery Units described above in paragraph 52 and is a mandatory subject for the purposes of collective bargaining.
- (c) Since about June 18, 1997, and for an unreasonable time thereafter Respondent through its agents, including Craig Cude, has delayed, failed and refused to recognize and bargain with UFCW 1167 as the exclusive collective-bargaining representative of the California Grocery Units described above in paragraph 52 and refused to furnish UFCW 1167 with the information which it had requested as described above in paragraph 72(a).

Local 1167 represents certain of the Respondents retail store employees including employees at store #954 in Blythe, California. At relevant times the employees at store #954 were covered by a collective-bargaining agreement, which states at article 5-A-1:

A full-time employee is defined as one who is hired to work at least forty (40) straight-time hours per week [five (5) eight (8) hour days] or who works at least forty (4)) straight-time hours a week [five (5) eight (8) hour days] in sixteen (16) consecutive weeks. For purposes of this Section, a Sunday or holiday worked will be considered to be straight-time hours in cases in which the Sunday or holiday is one (1) of the five (5) eight (8) hour days worked by the employee during the workweek in question. Holidays not worked but paid for shall not interrupt the sixteen (16) hour consecutive week requirement set forth in this Section. A specific individual's assignment to temporary vacancies caused by vacations, illness, injury, or leave of absence shall not count toward nor interrupt the aforesaid accumulation of sixteen (16) consecutive weeks. Such full-time employee is guaranteed a minimum of five (5) eight (8) hour days' work, when said employee works as scheduled or requested. [Brackets in original.]

In late January 1997, represented store 954 employee Maurico Andrade complained to William Graham, Local 1167's business representative and grievance coordinator, that he should have been, but had not been, reclassified from part-time to full-time status despite working a sufficient number of hours. Graham filed a grievance dated February 4, 1997, with Craig Cude, contract administrator of the Boise labor relations department. The grievance contended that Andrade "has been working over 16 consecutive weeks at 40 hours per week" and should under contract article 5-A-1 be reclassified to full time and pay him backpay. The letter concludes with the request:

"Please review your records and, if necessary, timecards for the past 12 months, notifying this office (in writing) of your findings and adjustments made."

Graham testified to a meeting on February 12, 1997, in which he and his supervisor, Leo Newman, met with Cude, Contract Administrator Kim Nelson, and the Respondent's vice president of labor relations, Andrew Scoggin, to discuss various matters current between the parties. Graham testified that he explained to Cude in that meeting that he needed to check Andrade's time records.

Cude sent a letter to Graham dated, February 19, 1997, asserting he had researched the payroll records of Andrade and found he had not worked "sixteen consecutive weeks as described in Article 5A to qualify him as a full-time employee." He also enclosed three pages of "payroll history" of Andrade which showed that, although he had worked over 40 hours for each week since July 1996, there was a single week—that ending December 29, 1996,—in which Andrade had worked only 38.25 hours of regular time.

Graham responded by letter dated March 5, 1997, challenging the number of hours Andrade should receive for the week ending December 29, 1996. The letter asserts the "original grievance stands as written" and seeks Andrade's reclassification as a full-time employee and his receipt of 8 hours of holiday pay for the Christmas holiday. No further communication having taken place on the matter, the Union by letter dated March 10, 1997, advised the Respondent it was proceeding to arbitration respecting the matter.

Graham testified he raised the Andrade grievance with Cude in their regular telephone review of grievances in April 1997. Graham testified he raised the grievance and Cude told him that the Respondent disagreed with the Union's position. Graham testified, "I told him at that time that we needed the daily time records of Mr. Andrade to make the determination whether we had anywhere to go with it or not." Graham testified that in the equivalent May phone call he told Cude, "Again, we reviewed the grievance of Mr. Andrade and I reiterated that I needed the time records, the weekly daily punches, and Mr. Cude said that he would get those to me." The information was not supplied and the parties did not resolve their differences respecting the grievance.

On June 18, 1997, Graham again wrote Cude respecting the Andrade matter asserting, in part:

Please send to Local 1167 the actual weekly time punches of Mr. Andrade for the time period from September 1996, through January 1997, in order to determine his full-time status.

There was no reply to this request. On July 17, 1997, the Union sent a followup letter noting its earlier request, the absence of a reply, the continuing need for the information and a threat: "Should we not receive them within two weeks from the date of this letter, we will seek whatever legal remedy is necessary in order to attain them." No reply was received. Graham testified that in a September 1997 telephone call he again renewed his request for the information with Cude.

The Union filed the charge herein in November, Crude and Graham exchanged voice messages, and the information at issue was faxed to the Union on December 10, 1997.

Cude testified that he never challenged the proposition that Andrade's 40-hour weeks were composed of scheduled 8-hour days because the store manager when asked indicated to Cude that he thought Andrade had been so scheduled. Cude testified that not only did he not challenge this fact with Graham, Graham in his memory had not ever mentioned it to him. Cude testified that his position on the merits of the grievance was that it turned on the issues related to the hours worked in the week ending December 29 and not on Andrade's hours in other weeks. Cude said he simply did not believe the records sought by Graham were relevant to Cude's view of the grievance.

Cude testified that he had been in contact with the store director in an attempt to obtain the store-based duplicate time punches, but that the store manager was busy, the records were not maintained at the store in an easily retrievable fashion, and that he had gone on medical leave for the bulk of October 1997. After his return, discovering the store had still not sent him the desired records, he called and learned there was a new store director. Requesting the records anew, he finally obtained them in a fashion that needed substantial editing. The records were finally produced to the Union on December 10, 1997. Through that date, Crude testified, he did not believe that Graham ever raised the issue of 5 8-hour days per week as a part of the Andrade grievance or as the reason for the records.

The parties dispute the conflicting versions of Crude and Graham respecting whether or not Graham renewed his requests for the punch cards in the conversations described, supra. I find it unnecessary to resolve the conflicting testimony because the written requests of the Union for the information, noted above, fully ripen the issue of the Respondent's obligation on this record to disclose the information. Oral requests or no,²⁸ if the Respondent was obligated to supply the requested information, its December response to the requests beginning in June was untimely and violative of the Act.²⁹

The General Counsel and the Charging Party argue that the records were needed by the Union to establish the contractual right of the grievant to the status the Union was seeking on his behalf. Since they were records respecting hours worked and were clearly a contractual determinant of the matter in issue, they argue, the records were presumptively relevant and should

have been provided timely upon request. Not having been so provided, they assert the Act was violated.

The Respondent does not challenge that proposition that the grievant had to have worked daily hours rather than weekly hours under the contract and that the records requested were relevant to that issue. The Respondent argues however that the Respondent never disputed the proposition for which the Union sought the records. In other words, the Union sought to prove that in each of the weeks that the grievant had worked 40 hours, he had been scheduled for 5 8-hour days, but the Respondent never disputed that fact. The Respondent argues that the sole issue involving this grievance was the issue of the number of hours of work for the week ending December 29. If the union theory on the proper calculation of hours for the week of December 29 prevailed, the Respondent conceded the grievant prevailed. But if the Respondent prevailed on its theory of the hours of the week of December 29, the Respondent also prevailed on the entire matter. Since the hours worked other than in the week of December 29 were neither in dispute nor determinative of the outcome of the dispute, the Respondent argues, they were irrelevant and there was no obligation to disclose them to the Union. The Respondent further argues that the weekly hours reflected in the payroll histories disclosed early on in the evolution of the dispute were sufficient for the Union to determine the merits of its grievance and that its position to the Respondent indicated that it was in fact relying on weekly not daily hours in asserting its claim of right.

At the onset of the analysis, I reject the argument of the Respondent that the weekly payroll records were sufficient for the Union to rely on to establish weekly employment. It is clear from the contract language quoted, supra, that daily hours are relevant. Indeed Cude himself believed this to be the case for he asked the store manager if the grievant had been scheduled to work 5 8-hour days a week and was told that the store manager thought so. The fact that the Union's correspondence in asserting the correctness of its view may have referred to weekly hours does not render the daily hours irrelevant.

The heart of the Respondent's argument is that it did not contest the daily hours issue in the Union's grievance and therefore it was unnecessary for the Union to establish the factual foundation for that element of their case and, further, the Union did not need the records to establish it nor did the Respondent need to provide the information. This position in my view reflects an important misapprehension of the duty to disclose information that in various permutations is reflected elsewhere in the record as a rationale for the Respondent's refusal to provide information and merits greater discussion.

A union's cause of action in a grievance before an arbitrator may be likened to a legal cause of action. As in the multiple assertions or counts of a complaint or other legal claim, the Union must establish multiple factual elements in proving its prima facie claim. The dispute between the parties may well focus exclusively on one single count of the Union's claim. The defense prevails if it defeats any single necessary element of the claim, but the Union must be able to prove all necessary elements of its claim including establishing each factual element by means of concession or admission of the employer of

²⁸ Were it necessary to do so, I would credit the testimony of Graham over Crude. I do so not only on demeanor grounds, but also because it is improbable in my view that an individual who had sent the correspondence set forth above seeking to obtain the information, even in one case under threat of "legal redress," would not have mentioned the matter during a conversation dedicated to the review of pending matters with the Respondent's representative to whom he had sent the requests

²⁹ The record provides no legally sufficient support for the Respondent's arguments that it made reasonable efforts to produce the documents. The delays caused by health interruptions, personnel changes at the store level, record storage anomalies, and the generally erratic response of stores to headquarters requests for documents, even if fully credited, simply do not justify an essential half-year delay in supplying these records.

by sufficient evidentiary proof, i.e., by evidence including employer records.

In the instant case, the Union to prevail in its arbitration had to establish not only the daily and weekly hours of the week ending December 29 but also the fact of 16 weeks of qualifying hours, which hours included daily hours. While the Respondent argues the true dispute concerned only on the week of December 29, the burden of proof as to the entire 16-week period was on the Union to establish by concession or admission of the employer or presentation of sufficient evidence. The critical distinction in this allegation—and similarly critical in the resolution of other allegations discussed in this decision—is that the Respondent at no time conceded nor admitted in a manner that could suffice to establish the fact before an arbitrator that the grievant's hours of work, other than in the week of December 29, were sufficient to carry the Union's claim. Put more directly, the Respondent here claims there was no dispute as to anything other than the week of December 29, but it never told the Union that it was conceding this fact and the Union therefore would clearly have to prove more to an Arbitrator to win its case.

The Respondent in this matter and in other similar matters discussed elsewhere in this decision seeks to have its cake and eat it too. It seeks to withhold information under the rationale that the information is not relevant because the Respondent does not contest the matter asserted, but it never makes an affirmative concession or admission to the Union on which the Union may rely respecting those elements of the case. The Union, ignorant of the Respondent's subjective determination that there is no true issue of fact respecting an element of its claim, must continue to try to obtain the proof it feels it must have respecting that element if it is to prevail in an adjudication.

The General Counsel and the Charging Parties have repeatedly asserted that the Respondent acted in a planned manner to thwart and frustrate the Union and raise its costs of administration and undermine its relationship with and support among represented employees by withholding requested information, delaying its provision, making onerous or difficult the obtaining of the information or providing incorrect or incomplete information. I have generally found that no such malign intention was established. I admit to grave suspicions here, however.

The Respondent agent's refusal to make concessions or admissions of fact, in effect putting its opponent, the Union, to its proof as to all matters and all elements of its grievance or arbitral claim is not evidence of bad faith. There is no obligation to volunteer facts or to make concessions. But the withholding of requested information because it is not deemed relevant to the dispute—because of an asserted union's belief in the truth of the claim for which the information is sought—cannot not be justified on the grounds that there is no issue of fact unless and until there is a clear and unambiguous concession/admission of the underlying contention to the opposing side—the Union herein

Put another way, if and only if, Cude or another agent of the Respondent had informed the Union that the Respondent was "conceding," "admitting," or "would not contest" either: (1) that the grievant had met the daily hours requirement for the weeks in which the personal history showed he had worked 40 hours per week or; (2) that the sole issue which would determine the outcome of the grievance was the dispute as to the hours of the week ending December 29 could the Respondent properly forgo providing the requested information in question.

Since the Respondent kept silent, a fact which is not in apparent dispute and which is a specific finding I make on this record, about its agreement with the Union's claim of the grievant's having worked qualifying hours for the weeks other than that of December 29, 1997, it had no justifiable reason to withhold timely production of the records requested. Having delayed production wrongly for almost half a year, the Respondent acted unreasonably and in violation of Section 8(a)(5) and (1) of the Act and I so find. I shall further consider the violation and similar violations found herein in the remedy section of this decision, infra.

g. Local 135—Complaint paragraph 73

Complaint paragraph 73 alleges:

- (a) On or about June 25, 1997, UFCW 135, in writing, requested that Respondent provide information concerning the exact cause of the suspension of employee Afm N. Hasan from Store 0400-1631 in relation to a grievance over such suspension.
- (b) On various dates including October 8, November 18, December 10, 1997, and February 11, 1998, UFCW 135, in writing, requested the following information:
- (i) documentation supporting Respondent's contentions concerning the reasons for such suspension;
- (ii) the name of the Oceanside Police officer(s) involved in the "covert operation";
- (iii) the names, addresses and phone numbers, along with any reports written by individuals about the alleged incidents that led to said employee's discharge.
- (c) The information requested by UFCW 135 as described above in paragraph[s] 73(a)–(b), is necessary for, and relevant to, UFCW 135's performance of its duties as the exclusive collective-bargaining representative of the California Grocery Units described above in paragraph 52 and is a mandatory subject for the purposes of collective bargaining.
- (d) Since about October 8, 1997, and for an unreasonable time thereafter Respondent through its agents including Craig Cude has delayed, failed and refused to recognize and bargain with UFCW 135 as the exclusive collective-bargaining representative of the California Grocery Units described above in paragraph 52 and refused to furnish UFCW 135 with the information which it had requested as described above in paragraph[s] 73(a)–(b).

Local 135 represents certain of the Respondent's store employees including the pharmacists at store #1631 in Vista, California. On June 23, 1997, a pharmacist, Afm Hasan, was suspended and then terminated by the Respondent. Hasan asked the Union to filed a grievance. By letter dated, June 25, 1997, Jerry Sadowski, special assistant at Local 135, sent a letter to Cude advising him of the grievance respecting the suspension of Hasan. The letter asked, inter alia:

Please forward, in writing, the exact cause of suspension as per Article 03 of our agreement.

It is imperative we have this information within the next seven (7) calendar days so a complete investigation can be made. In the event that we do not hear from you within the next seven (7) calendar days, we will assume that you do not desire to resolve this matter and shall proceed accordingly.

Michael Cormier, business representative for the Local, testified he went to store #1631 in early July 1997 and met with then Store Director David Scheunemann. He testified he told the director he was investigating the Hasan grievance and that Sheunemann told him, "that he didn't know anything about that grievance, that he wasn't involved in that investigation and that I should contact Craig Cude in Boise."

Store Director Scheunemann testified he first talked to Cormier in late June or early July 1997, and then only regarding Hasan's claimed need to retrieve certain materials from the store. He testified the conversation did not involve any discussion of the termination. Two weeks or so later, Scheunemann testified Cormier came to the store to obtain certain of Hasan's property and as they were leaving the store Cormier for the first time asked about the discharge. Scheunemann testified:

At that time, I told him what I knew about the investigation, that there were allegations made against Afm [Hasan] by several customers, that I had contacted Loss Prevention, and that Karen Laser had set up the operation with the Oceanside Police Officer, who was a friend of hers, and that the result of that was his suspension.

Scheunemann testified he also directed Cormier to Boise for further information. Scheunemann's April 7, 1998 declaration states that Scheunemann also told Cormier that no store personnel other than himself was involved in the matter and that after receiving customer complaints he passed the information on to the Respondent's loss prevention staff and labor relations department.

Scheunemann testified he had a third conversation by telephone with Cormier in February 1998, in which, in essence, he repeated his representations of the previous conversation. No response having been received in the interim from Cude, Sadowski sent a second letter to Cude dated July 24, 1997, informing him that the Union was proceeding with the Hasan matter to arbitration.

Cormier testified that in late July 1997, he telephoned Cude in Boise and inquired about the Hasan matter. Cude related a variety of incidents and circumstances regarding Hasan, which included the fact that customers had complained and that a shopping service had reported irregularities. Cormier recalled that Cude said he would follow up by putting the information in writing. Cormier specifically recalled that Cude did not mention the involvement of a police department or officer. Cude's testimony was less specific as to time, but generally agreed with Cormier's version of the conversation.

By letter dated, July 25, 1997, Cude responded to Sadowski and reported at some length the circumstances relied on by the Respondent to suspend and discharge Hasan. Included were representations that the Oceanside, California police depart-

ment had conducted a "covert operation" which revealed irregularities in ringing up the product sale. ³⁰ He also reported several customer reports of suspicious and irregular transactions. On October 8, 1997, Sadowski responded with a letter requesting "documentation supporting your contention." The letter sought:

[T]he names of the Oceanside Police officer(s) involved in the "covert operation." The names, addresses, and phone numbers, along with any reports written by individuals about the alleged incidents that led to Mr. Hasan's discharge.

There being no response to the July 25, 1997 letter, Sadowski on November 18, 1997, sent a second letter referring to his earlier letter and the fact that no response had been received. The letter continued, in part:

Therefore, Local 135 renews our request for names(s) of the Oceanside Police Officer(s) involved in the "covert operation". Also, the names, addresses, and phone numbers of witnesses, and/or reports used by Albertson's as a basis for the termination of Mr. Hasan.

No response having been received, Sadowski wrote again on December 10, 1997, noting the earlier two letters he had sent seeking information regarding Hasan and the fact that no reply had been received. The letter concluded that "should I not hear from you in an expedient manner, Local 135 will take appropriate action."

By letter dated, December 22, 1997, Cude acknowledged the request for the name of the Oceanside police officer(s), but simply referred Sadowski to the "police department directly." The letter also included a copy of a statement signed by Hasan confirming his understanding of store policies. The letter did not otherwise address the remaining requests for information. Cude testified however that he believed he had responded fully to Sadowski's inquiry.

Soon after the Union received Cude's letter, Cormier went to the Oceanside police department to seek information. He testified that he was informed by the Oceanside police that they did not have jurisdiction over the store location and referred him to the San Diego sheriff substation office that covered the store location. His efforts there and at the main San Diego sheriff's office were also unavailing. He was informed that the sheriff's department had not been involved in any investigation regarding Hasan.

On February 11, 1998, Sadowski wrote to Cude reviewing his earlier letters requesting "the name(s), address(es), and phone number(s) of witnesses ands/or reports used by Albertson's as the basis for the termination of Mr. Hasan." The letter complained of Cude's failure to provide the requested information as well as the incorrect information respecting the Ocean-side police. The letter described the Union's misdirection to Oceanside and the report that the San Diego sheriff's department has jurisdiction but had not conducted an investigation. The letter concluded: "UFCW Local 135 makes a final pleas

³⁰ Cude testified he made these representation based on a misapprehension of the loss prevention report prepared by the loss prevention department.

[sic] before we take appropriate action. We request names of witnesses, statements, or report that lead to Mr. Hasan's discharge."

Having received no response, Sadowski filed the instant charge on March 5, 1998. That same day Sadowski received a telephone call from Cude and Scoggin. Sadowski aired his complaints about lack of information and receipt of misinformation and was informed the Respondent would provide a letter with the names of individuals who could provide the needed information and named the store manager as a source of information

After this call, Sadowski sent Cormier to store #1631 and there Cornier spoke again to the store director who told him that the information had been sent to Boise some time before but also provided additional information including the name of the involved loss prevention officer. The director also said that the loss prevention agent who did the investigation had enlisted the assistance of an off duty friend who was employed by the Oceanside police department. Cormier contacted that individual and she confirmed the events at the pharmacy while emphasizing the investigation of the matter was an unofficial action and not part of an Oceanside police department action.

A few days later, the March 5, 1998 letter of Cude to Sadowski arrived at the union offices. The letter recapitulated the conversation of March 5 described above and expressed a desire to reach accommodation with the Local on supplying information. It also referred to enclosures that did not in fact physically accompany the letter. Thereafter, upon inquiry, it was determined that the omitted information had been misdirected by the Respondent to another UFCW office and was ultimately sent to and received by the Local from the other receiving local on March 17, 1998. On April 2, 1998, the Union sought to withdraw its charge, but the director did not approve the withdrawal request.

The Respondent seeks approval of the Charging Party's withdrawal request. Based on the identical motion, arguments for and against, and the analysis set forth in detail with respect to paragraph 58 of the complaint, I deny the motion. The record establishes a sufficient history of violations of the Act by the Respondent to sustain the General Counsel's opposition to approval of the settlement.

Turning to the merits of the allegation, at the threshold I resolve the conflicting versions of the conversations of Cormier and Scheunemann as follows. I credit the testimony of Cormier over Scheunemann that in their initial conversation soon after Hasan's suspension, Cormier asked about the discharge, but was referred to Boise. I specifically find that Scheunemann did not provide the extensive information about the Hasan matter he testified to disclosing to Cormier until the two individual's final conversation on the matter in 1998. The uncontested subsequent events are inconsistent with the Union knowing about the role of the Respondent's loss prevention agent and the Oceanside police department employee. Further, I found Cormier to be the superior witness in terms of demeanor.

The Government and the Charging Party argue that the information sought was relevant to the grievance, that the repeated requests were ignored, responded to with partial information and responded to with misinformation or misdirected

information. They argue the Respondent here once again utilized the tactic of nonresponse at the store level followed by delay and prevarication at the headquarters labor relations level to hamper the Union in its duty of representing employees. The Charging Party notes that the Respondent in addition to delaying its responses inordinately, simply refused to supply the names of complainants without discussion or the offer of alternatives. Such a blanket refusal, argues the Charging Party, violates the obligation to balance interests of *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), citing *Metropolitan Edison Co.*, 330 NLRB 107 (1999).

The Respondent argues that it did not violate the Act. Thus, the Respondent argues that it fully responded to the Union's requests for information in Cude's letter of July 25, 1997, and in Scheunemann's remarks to Cormier in July. I have discredited, above, Scheunemann's testimony in that regard. The Respondent argues further that the mistake Cude made in referring to a covert operation by the Oceanside police was a simple inadvertence, regrettable, but not of legal significance. The Respondent further argues it was not obligated to provide the names or contact information respecting complaining customers who did not give permission to reveal their names. Additionally, the Respondent argues that the Union's October 8 request for documentation in support of the Respondent's decision to suspend and terminate Hasan was abandoned by the Union's failure to repeat or incorporate it in its subsequent communications with the Respondent.

The Respondent seeks to justify Cude's failure to respond to the October letter by asserting first Cude's emergency medical leave in October and his subsequent inundation by work that had accumulated during his October absence. Cude testified, and his testimony was quoted in the Respondent's brief in support of the proposition, that when he returned to work he was inundated with more important matters, i.e., "the highest priority issues," "these [information requests] were in my box when I got back probably, but the other pressing matters had to take precedence over them."

The Respondent repeatedly suggests that the Union did not act with dispatch respecting the materials submitted nor did it on its own followup timely on information it had on hand. From this the Respondent argues the matter was of no importance to the Union and therefore the Respondent's obligations under the Act were in consequence reduced or its conduct excused.

Based on the record including the credibility resolution noted, I find that the Respondent unreasonably omitted to acknowledge and delayed its provision of the requested information as alleged in the complaint paragraph and in so doing violated Section 8(a)(5) and (1) of the Act. I reach that conclusion for the following reasons. The analysis is two part: the identification of what was withheld and consideration of the reasonableness of the period of withholding.

The Union clearly sought the Respondent's decisional documents in its October request letter. The Respondent argues that the request was abandoned in the following correspondence. I reject this argument. The Union never explicitly abandoned the request. The Respondent argues it did not explicitly restate and repeat it in the later numerous request let-

ters. That may be true, but there is no obligation on the part of a party making a request to repeat it in followup letters. To hold otherwise would be to burden the union and require it, if the employer does not respond, to repeatedly exhort compliance from the employer. Since information was neither provided nor an explanation given that no such documents existed, the Respondent violated Section 8(a)(5) and (1) of the Act in withholding its response until the grievance was resolved and the information was no longer material.

The Union sought the names of the persons supplying information relevant to the Hasan matter. This raises two separate issues. The first issue is the misinformation provided by Cude regarding the Oceanside police participation. I agree with the Respondent that the record does not support a finding that Cude was willfully misleading the Union or that he knew that what he was representing was false. On this record, however, including the evidence that Cude was over extended and unable to devote the time reasonably necessary to insure the information that he passed along was correct, I find that the Respondent was negligent in not devoting the time and resources necessary to insure correct responses to the Union—be it through the agency of a negligent Cude or the fact of an agent given insufficient help to do his assigned duties in a reasonable manner.³¹ I therefore find that the Respondent acted unreasonably in misleading the Union regarding the Oceanside police participation in the Hasan matter. I further find that in so acting the Respondent violated Section 8(a)(5) and (1) of the Act.

The second issue is the refusal of the Respondent to release the names of the customers who had given evidence against Hasan. I agree with the Charging Party's argument and cases cited above, that the Respondent was obligated to do more that simply refuse to respond to the request and later to simply deny it. I find that the Respondent's failure to respond with at least an explanation of the basis for denial and a proposed alternative that could accommodate its confidentiality interests was unreasonable, impermissible under the cases, and a violation of the Act. Later, in holding the post unfair labor practice charge conversations noted supra and in supplying the faxed information to the Union, I find that the Respondent had provided sufficient information to constitute a substitute for the customer names and addresses requested. In so doing, at that time, the Respondent met its burden giving an of explanation and the suggestion or, in this case, actual provision of alternative information. And, in fact, the information provided was sufficient to allow the Union to make a final determination regarding the merits of the underlying grievance. But until that point, the Respondent's simple denials both, sub siliento and later explicit, but unexplained refusals, announced without alternatives, were unreasonable and violated Section 8(a)(5) and (1) of the

In reaching these conclusions I reject the Respondent's defense that its compliance with the information requests was reasonable given the special circumstances pertaining in this particular case. First, I find persuasive the Charging Party's

cited cases that the Respondent may not rely on Cude's health emergency and the press of more important matters to justify simply not responding to the Union's repeated written requests for relevant information over a period of several months. The Respondent is a large organization with a significant staff dealing with labor relations' matters. Institutional provision may reasonably be made in larger organizations to provide relief or supplementary assistance in times of extraordinary situations. The ill health or required absences of particular individuals within a larger organization is—both abstractly as a function of the frailty of the human condition and specifically within the Respondent's labor relations department over the years involved in the instant litigation—not an unforeseeable or unanticipatable circumstance, nor are the occasions when the press of business may overwhelm particular individuals. As the Charging Party notes, the Board rejects the argument that an employer's responses to information requests may properly be delayed if the employer simply considers other matters more urgent. Samaritan Medical Center, 319 NLRB 392, 398 (1995); Bundy Corp., 292 NLRB 671 (1989).

I also reject the argument of the Respondent that the Union did not act with sufficient zeal and dispatch regarding its information requests to obligate the Respondent to comply with the requests. First, I do not find the Union's processing of the information provided or its handling of the grievance investigation unreasonable under all the circumstances. More importantly, however, as noted in the cases discussed elsewhere in this decision, the Union's request for relevant information does not fail, and the Respondent's obligation under the Act to supply that information is not diminished by, the subsequent speed and manner in which the information is utilized by the Union.

h. Local 7

(1) Background

Local 7 has at all times material represented various of the Respondent's store employees in the Denver, Colorado, and Front Range areas. The Respondent's director of labor relations and attorney for the Rocky Mountain region, Christopher Yost, testified that in 1995, Local 7 represented perhaps 2500 employees in 30 to 35 stores. It is a large Local representing many employees and maintained at relevant times its own staff of attorneys handling, inter alia, matters involving the grievance and arbitration process. Counsel for Local 7, John Bowen, testified that Local 7's pending grievances with the Respondent were essentially, "all, but a handful," resolved in 1990. Thereafter, however, by the fall of 1994, grievances had not been resolved and were backlogged awaiting arbitration in numbers exceeding 800. At that time, the Local initiated court litigation seeking to compel the Respondent to arbitrate the pending grievances. Yost testified he joined the Respondent in March 1995 replacing Schwarzkopf, to discover this very substantial backlog of unresolved cases as well as the pending litigation.

- (2) Complaint subparagraphs 63(c), (d), and (e) Complaint subparagraphs 63(c), (d), and (e) allege:
 - (c) Since about March 17, 1994, UFCW 7 orally requested that Respondent provide any and all information reviewed and relied upon in making the decision to issue

³¹ I further find, as discussed supra, that no "swamping" defense is available on this record in this instance to the Respondent to justify or excuse the negligence found.

the written warning which was the subject matter of Grievance 645-94 involving Rick Siepkes.

- (d) Since about April 20, 1994, UFCW 7 orally requested that Respondent provide any and all statements of misconduct made by female employees relating to Grievance 645-94 involving Rick Siepkes.
- (e) On various dates including March 21 and June 6, 1994 UFCW 7, in writing, requested, in relation to Grievance 645-94 that Respondent provide any and all information, including statements by employees, reviewed and relied upon by the decisionmaker to discipline Rick Siepkes.

Complaint subparagraphs 63(y) and (z) allege:32

- (y) The information requested by UFCW 7, as described above in paragraph[s] 63(a)–(x) is necessary for, and relevant to, UFCW 7's performance of its duties as the exclusive collective-bargaining representative of the Denver Grocery Unit, Front Range Meat Unit, UFCW 7 Max Foods Clerks Unit, UFCW 7 Max Foods Meat Unit, and Casper Clerks Unit described above in paragraphs 6–9 and 13 and is a mandatory subject for the purposes of collective bargaining.
- (z) Since about the dates specified in paragraph[s] 63(a)–(x) above and for an unreasonable time thereafter, Respondent, by and through its agents Beverly Erickson, Karen Freckleton and Michael Schwarzkopf, has delayed, failed and refused to furnish UFCW 7 with the information requested as described above in paragraphs 63(a)–(x).

(a) Facts

Employee Rick Siepkes was employed in a represented position at the Respondent's store #888 in Aurora, Colorado, in March 1994. On or about March 3, 1994, Siepkes received a disciplinary writeup dated March 2, 1994. The discipline noted in part that Albertson's had "recently received allegations that you have made comments to female employees that were considered sexually offensive or harassing." The letter continued:

Accordingly in fairness to you and the company, this letter is to advise you that if in the future you engage in any conduct, including but not limited to, foul language, comments, gestures, physical contact, touching or any actions which could be reasonably construed to be sexually offensive or harassing, you will be subject to additional discipline up to and including termination.

Siepkes contacted Local 7 and Local 7's representative, then Business Agent John Mathewson, met with the store grocery manager and acting store director, Bruce Bivens³³ and Siepkes about 2 weeks later to discuss the matter. Mathewson testified:

I asked directly who—who the female employees were that were alleging Mr. [Siepkes] had been sexually harassing them. I asked for copies of their statements because Mr.

[Siepkes] had told me that it was not true, that he had not been sexually harassing anybody. . . . I think at one point Mr. [Bivens] did give me some general—I believe that he gave me some general comments that Mr. [Siepkes] was alleged to have made that were rather graphic comments, but I never did get the—the names of the employees that were alleging that he had said these things.

Mathewson's note of the meeting indicates that he sought "any and all information reviewed and relied on" by the Respondent in issuing the discipline and that Bivens told him that he was not able to divulge the names of the complaining female employees.

Mathewson filed a grievance respecting the matter on March 21, 1994. On the grievance the statement appears: "The Union is requesting any and all information reviewed and relied upon by the decision maker to discipline Mr. Siepkes." On April 4, 1994, the Respondent's contract administrator, Beverly Erickson, replied, denying the grievance and reporting her investigation indicated Siepkes had been disciplined for "improper conduct." The letter did not acknowledge, respond to or address the request for information in the March 21, 1994 grievance.

On April 20, 1994, Mathewson testified he had a short conversation with Erickson. He recalled that he:

[R]enewed my request for the names of the employees that had made the allegations against Mr. Sipcus and copies of their statements. . . . I believe she said that she would discuss that with the store manager and that she would send them to me

On June 6, 1994, Colleen Parsley, Local 7's associate general counsel, wrote to Erickson. The letter had the following text:

Per your conversation with John Mathewson on April 20, 1994, please provide Local 7 with any and all statements of misconduct generated by female employees against Mr. Siepkes in the referenced matter. It is our understanding that these statements were read to you over the phone by Bruce Bivens, Acting Store Manager and that you would provide us copies upon your receipt of the same. To date we have received nothing.

Please provide the undersigned the requested information in addition to any other documentation upon which the Company relied in this matter within twenty-one (21) days of the date of this letter. If Albertson's does not provide the requested information within the specified time period, the Union will proceed to file unfair labor practice charges with the National Labor Relations Board.

Please feel free to contact the undersigned with any questions or concerns in this regard. Thank you for your attention to this matter.

On September 14, 1994, the instant unfair labor charge was filed alleging a failure to provide the requested information. On January 13, 1995, Erickson wrote to Parsley setting out the Respondent's responses to fifteen of the Local's information requests. Response number six stated: "Rick Seipker ([grievance number] 645-94)—I have requested the statements from the Store and will forward to you upon receipt." On January 31,

³² These two complaint subparagraphs apply to all action subparagraphs of complaint par. 63 and will not be repeated following the remainder of the discussion respecting the various action subparagraphs of complaint par. 63.

³³ The Tr. Vol. 21 for October 13, 1999, refers to Bibbons and Sipcus. The correct spelling of each individuals name is used herein.

1995, Erickson wrote Parsley respecting various information requests. Included with the letter were the statements of the female employee complainants respecting sexual harassment by Siepkes.

Erickson suffered serious health problems resulting in her death prior to the hearings herein. Her health problems precluded the Respondent obtaining her participation in the investigation and preparation of the defense to the instant allegation. Attorney Yost testified that the Respondent's practice in the Rocky Mountain division—which would have been known to Erickson at relevant times—was generally against disclosing witness statements in sexual harassment cases and that generally the disclosure of sexual harassment complainants was only done on a case-by-case basis. Factors considered in making disclosure included the number of complainants, the degree of discipline, and the stage of the proceeding.

(b) Analysis and conclusions

(i) A threshold matter

Before dealing with the merits of the allegation, it is appropriate to deal with a defense raised by the Respondent relevant to allegations involving Erickson. Various allegations of the complaint allege the Respondent violated its obligations under the statute through the actions or inactions of Erickson. There is no question respecting the instant allegation and others that the evidence of Erickson concerning the circumstances of information request processing and other relevant matters would have assisted the Respondent in preparing and proving its defense to the allegations herein. Erickson's failing health and eventual death prevented the Respondent from obtaining her aid, assistance and participation in the Respondent's case.

The Respondent argues that the unavailability of Erickson both as a witness and as a participant in the Respondent's preparation of its defense prevented it from being able defend itself. The Respondent argues further that this state of affairs resulted, in part, from the Government's improper delay in both informing the Respondent that complaint would issue so that it was on notice to prepare its defense and in actually bringing the matter to hearing and to the parties proof.

From these assertions the Respondent at the hearing sought the dismissal of the charges and complaint allegations in which Erickson was the alleged wrongful actor. That motion was dismissed and my ruling will not be reviewed here. Further, the Respondent argues that the unavailability of Erickson should be a matter to be taken into account in evaluating the evidence and should allow in certain circumstances hearsay evidence to be received substantively in the Respondent's favor. The General Counsel and the Charging Parties opposed the Respondent's arguments to the extent they sought consideration beyond that normally encompassed in the evaluation of evidence where a participant in disputed events is deceased.

I rejected the Respondent's arguments at trial that the General Counsel's timing of the instant complaint and hearings was in some way improperly delayed and should in consequence limit or weaken the Government's rights in the proceeding or conversely increase the Respondent's. I remain of that view. Beyond that however I find it appropriate to take notice of the record evidence respecting Erickson's health and unavailability

as a participant in the preparation of the Respondent's defense and witness on its behalf. Where appropriate I have considered those facts in making evidentiary rulings and in evaluating disputed matters. In some cases, as specifically noted in each case, I have received certain evidence substantively in part because of the circumstances of Erickson.

(ii) The allegation

The Respondent argues that it substantially complied with the request for information by providing a detailed accounting in the initial meeting between the acting store director and the union representative. Withholding the names of the complaining employee witnesses and their statements, argues the Respondent, was "reasonable given the sensitivity and confidentiality of such information." (R. Br., complaint par. 63, p. 19.) The Respondent also cites the Board's decision in *Anheuser-Bush*, 237 NLRB 982 (1978), for the proposition that prearbitration disclosure of employee witness statements are exempt from required disclosure.

The Charging Party emphasizes that an employer may not simply refuse to supply the requested statements of employees, but must rather offer to bargain with the Union respecting alternatives and that a failure to do so is a violation of Section 8(a)(5) of the Act citing *Metropolitan Edison Co.*, 330 NLRB 107 (1999).

The Respondent argues that, given the unavailability of Erickson a fair inference is that she discussed with the Union the position of the Respondent and that an accommodation was reached. This is directly contrary to the testimony of Mathewson who specifically recalled that Erickson agreed to provide the statements. And the testimony of Mathewson is corroborated by the language in the June 6, 1994 letter of Parsley to Erickson:

Per your conversation with John Mathewson on April 20, 1994, please provide Local 7 with any and all statements of misconduct generated by female employees against Mr. Siepkes....

Mathewson's demeanor was persuasive, his memory of the event clear. I credit his testimony. I find that the Respondent did not attempt to make any accommodation with the Union respecting the provision of the requested statements nor did the Respondent provide the names of the complaining employees. The statements were provided approaching a year after the request and after an unfair labor practice charge had been filed, but that tardy compliance with the request does not shelter the wrongful delay. I find the Respondent in so delaying the disclosure in the absence of any attempt to reach an accommodation respecting the statements violated Section 8(a)(5) and (1) of the Act.

(3) Complaint subparagraphs 63(f) and (h)

Complaint subparagraphs 63(f) and (h) allege:

(f) On various dates including March 21 and June 6, 1994 UFCW 7, in writing, requested in relation to Grievance 649-94, that Respondent provide all information reviewed and relied upon by the decision-maker to write up

Myla Moore, including the complaining customer's name and telephone number.

(h) Since about April 20, 1994 UFCW orally requested, in relation to Grievance 649-94 involving Myla Moore, that Respondent provide the name of the person that the customer in question complained to before said customer left the store.

Local 7 represents employees at the Respondent's store #872 in Thornton, Colorado. In early March 1994, Myla Moore, a represented store employee, received a written warning based on a customer complaint. She contacted Local 7 and spoke to Mathewson. She told him that she had received the warning for being rude to a customer but that "she wasn't rude to any customer and briefly explained to me that the customer was upset when she came into the store because her cake order wasn't ready." On March 17, 1994, Mathewson, held a contractually provided pregrievance step-1 meeting with Store Director Ken Ringleman. He did not obtain either the written warning nor any of the details respecting the basis for the warning. Mathewson filed a grievance respecting the warning on March 21, 1994. The grievance contained the request:

The Union is hereby requesting any and all information reviewed and relied upon by the decision maker to write Ms. Moore up including customer's name and phone number.

Karen Freckleton, contract administrator, on behalf of the Respondent, responded by letter dated April 4, 1994, informing Mathewson that employee Moore had ignored a customer on March 2, 1994, and when the customer asked for service, Moore was rude. In consequence, Freckleton wrote, Moore received a written warning. She added that she had requested from the store director "the information you requested in your grievance and upon my receipt will forward [it] to you."

Mathewson testified he had a conversation with Freckleton on or about April 20, 1994, in which he sought information respecting the grievance. He recalled that Freckleton agreed to supply him a copy of the written warning given to Moore and that he subsequently received it.

On June 6, 1996, Local 7 Counsel Colleen Parsley wrote Bev Erickson a letter respecting the Moore matter with the following text:

Per your correspondence to John Mathewson dated April 4, 1994, you have agreed to provide Local 7 with any and all information reviewed and relied upon by the decision maker in the referenced matter. This information was to include the complaining customer's name and telephone number. To date, nothing has been received by the Union in this regard.

Please provide the undersigned the requested information within twenty-one (21) days of the date of this letter. If Albertson's does not provide the requested information within the specified lime period, the Union will proceed to file unfair labor practice charges with the National Labor Relations Board.

By letters dated, June 13 and 17, 1994, Erickson wrote Parsley. She stated that she had checked with Freckleton and was assured by Freckleton that "she made no agreement to provide

Mr. Mathewson with any sort of customer information whatsoever in regards to this matter." The Respondent did not provide the customer's name and phone number. Yost testified that it is not the Respondent's policy to provide such information to the Union. Mathewson testified that he had never had the Respondent's refusal to provide the customer's name explained to him nor did the Respondent seek to discuss alternatives. The information was not provided. The Union filed the instant charge on September 15, 1994.

The General Counsel argues that the information sought was presumptively relevant and the Respondent's purported nondisclosure policy was both undocumented and never communicated to the Union. In such circumstances, argues the General Counsel, refusal to provide the information violates Section 8(a)(5) of the Act citing, Postal Service, 332 NLRB 635 (2000). The Charging Party argues that when a customer's complaint leads to disciplinary action, the Union has a right to the customer's name and phone number to properly represent the disciplined employee citing Resorts International Hotel Casino v. NLRB, 996 F.2d 1553, 1556-1557 (3d Cir. 1993); New England Telephone Co., 309 NLRB 558, 561 (1992). The Charging Party also argues that at no time did the Respondent attempt to work out an accommodation with the Union over any concerns of customer confidentiality and did not assert that the customer had a fear of retaliation or had been assured he or she would remain anonymous. Therefore argues the Charging Party, the Respondent's alleged policy against disclosure was an "after thought and is too little too late." citing Gas Spring Co., 296 NLRB 84, 99 (1989), enfd, mem, 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991). (Charging Party International Food and Commercial Workers Union's brief at

The Respondent argues that there is insufficient evidence to find that the Respondent ever agreed to supply the name of the customer or information on how to phone or otherwise contact that individual. Further, argues the Respondent, where there is a legitimate claim of confidentiality, a balancing test is necessary to determine if the information should be disclosed. Here, the Respondent argues there is "a reasonable inference that Albertson's provided confidentially during its interactions with the customer regarding the complaint at issue." (R. Br., complaint par. 63 p. 26.) This being so, the balance on the facts presented here should be drawn to preserve the customer's name and contact information.

The Respondent also notes that there is no evidence that a specific oral request was made for the information on April 20, 1994, thus defeating complaint paragraph 63(h) on the facts. Finally the Respondent notes that Erickson's letter to the Union dated January 13, 1995, summarizing the status of various information requests, recited respecting the Moor matter, "This grievance was resolved during the 9/94 grievance meeting." Thus argues the Respondent the matter is moot and no remedy would be appropriate under any and all circumstances.

At the threshold, I agree with the Respondent that there is insufficient evidence to support a finding that the Respondent agreed to supply the customer's name and phone number and then reneged on that agreement. Rather I find there may well have been a mistake or misinterpretation respecting informa-

tion, but not an agreement on the Respondent's part to supply the specific customer name and phone number sought in the Moore matter. I also agree with the Respondent that there is insufficient record evidence that an oral request for the name of the person to whom the customer complained was made by Mathewson or any other union official on or about April 20, 1994. I shall therefore dismiss complaint subparagraph 63(h).

I disagree, however, with the Respondent's argument that there is sufficient record evidence to support a finding or even a presumption that the customer involved was given assurances of confidentiality or anonymity, or that the Union was given any basis for the withholding of the customer's name and contact information. The Respondent argues that Yost's testimony supports the view that the Respondent endeavored to protect its customers. That is insufficient evidence to find that the store director or store personnel—not labor relations staff—gave any assurances to the customer. I also find, based on the correspondence and the testimony of Mathewson, that there was no statement by the Respondent to the Union that this particular information was being withheld due to issues of confidentiality and, further, I find that there were no efforts by the Respondent to suggest alternatives or reach accommodation with the Union respecting disclosure of this information.

The Respondent claims that the Union did not itself seek accommodation with the Respondent concerning this information. This is standing the rule on its head. It is up to the withholding party to initiate the process—discussed in the cases cited by the Parties—of justifying initial withholding of information and through discussion and accommodation offering to go as far as is reasonable under all the circumstances in disclosing that which is reasonable to disclose. The Respondent on this record simply denied that it had ever agreed to disclose the information and refused to disclose it. That bare refusal is insufficient under the cases cited and violates Section 8(a)(5) and (1) of the Act and I so find. I therefore sustain the General Counsel's complaint subparagraph 63(f).

To the extent the Respondent argues the matter was soon resolved, I do not rely on the hearsay assertions in this regard in Erickson's letter as quoted above.³⁴ Even were it correct, the matter would have been settled months after the Respondent initially refused to provide the information and after the instant charge had been filed. Resolution of the underlying dispute which was the initiating cause of the request for information at that late stage does not reduce the remedy required for the violation found.³⁵

- (4) Complaint subparagraphs 63(g), (i), and (t) Complaint subparagraphs 63(g), (i), and (t) allege:
 - (g) Since about March 30, 1994 UFCW 7 orally requested that Respondent provide information on all full-time male employees who were working reduced hours in the Denver metropolitan area in relation to Grievance 270-94 involving Donna Bernard.
 - (i) Since about May 10, 1994 UFCW 7, in writing, requested that Respondent provide a list which identifies all full-time employees, male and female, within the bargaining unit in relation to Grievance 270-94 involving Donna Bernard.
 - (t) Since about July 26, 1994 UFCW 7, in writing, requested that Respondent provide the following information in relation to Grievance 270-94 involving Donna Bernard:
 - (i) the schedules for all employees employed at Respondent's store #859 for the period July 1, 1993 up to and including June 30, 1994;
 - (ii) the timecards or lists of hours actually worked for all employees employed at Respondent's store #859 from July 1, 1993 up to and including June 30, 1994;
 - (iii) all personnel manuals or documents describing the duties of the head bakery sales clerk, bakery manager, bakers and all management personnel;
 - (iv) the names, positions, business telephone numbers and addresses of all witnesses Respondent intends to have testify at the hearing on this matter or who have knowledge of this matter.

(a) Facts

The Union represents employees of the Respondent's retail stores in the Greater Denver area including store #859 in Aurora. At relevant times represented employee Donna Bernard was employed at that store. In December 1993, Bernard complained to the Union that she had her hours reduced from 40 and that no male full-time employee had experienced a similar reduction in hours. On December 20, 1993, the Union through Mathewson filed a grievance with the Respondent alleging these facts as sexual discrimination. The Respondent's contract administrator, Erickson, responded by letter dated January 4, 1994, to Mathewson contesting the assertions of the grievance.

Mathewson met with Erickson on March 30, 1994, as part of the grievance adjustment meeting process. He testified he asked for "information regarding the number of male full-time employees working for Albertson's in the Denver metro area that were working reduced hours" and that Erickson responded that he would get the information. Mathewson's notes of his meeting with Erickson record the request for all full-time male

render disclosure no longer appropriate may be raised at the compliance stage of these proceedings. Such subsequent events may be offered only to address the need to provide the information sought by the Union, it will not be considered for a diminution or change of the remedy directed herein in other respects.

³⁴ While I have relied on certain other statements contained in this letter for their truth because the absence of Erickson made it difficult or impossible for the Respondent to other wise establish them, this factual contention could easily have been established by the Respondent without relying on Erickson's hearsay communication for the truth of the matter asserted.

³⁵ As is obvious from the date of these 1994 events and other events in controversy, much time has passed. Doubtless many of the matters remaining in controversy on this record will have been resolved and the information earlier sought—and directed herein to be provided—will no longer be sought. The order herein will require disclosure of all information properly sought by the Charging Parties, as found herein, which on this record warrants disclosure. Subsequent events which

employees who are working reduced hours in the Denver metro area, but does not recite what response if any was given by Erickson to the request.

On April 15, 1994, Respondent's labor relations regional director, Michael Schwarzkopf, for the team serving the Respondent's Rocky Mountain division wrote Local 7's associate general counsel, John P. Bowen, telling him that it had been reported by Erickson and her colleague Freckleton that the Union wanted information regarding "males reduced from full time to part time and,—suggesting he may not have understood, asked precisely what information the Union was seeking.

On May 10, 1994, Bowen replied to Schwarzkopf by letter seeking a list of all full-time employees, male and female, within the bargaining unit. The letter noted that since the grievance concerning different treatment of full-time employees based on sex, "it is necessary for us to identify who are male and female full-time employees." The letter also asserts: "As we understand it, the company keeps no records of whom it considers only full-time employees." The Union also asks: "If the company does not know and identify who are full-time employees then how is it able to administer effectively the language of the Collective Bargaining Agreement regarding assignment to full-time and reduction of hours."

Having received no information from the Respondent, the Union moved the grievance toward arbitration. By letter dated July 26, 1994, Union Counsel Parsley wrote the Respondent's Erickson concerning the Bernard grievance asserting, inter alia: "In order to prepare this case for arbitration, the Union needs the following information and/or documents from Albertson's." The letter then lists the information set forth in complaint subparagraph 63(t)(i–iv) and threatens to file unfair labor practice charges if the information is not supplied. The information was not supplied and the instant charge was filed on September 15, 1994.

On January 13, 1995, in the summary letter referred to variously supra, Erickson addressed the request stating she had "requested copies of schedules and timecards from the stores and will forward to you upon receipt." The job descriptions sought as alleged in complaint subparagraph 63(t)(iii) were sent by Erickson to the Union on January 31, 1995. In her communication, Erickson indicated the "requested years worth of timecards and schedules" would be provided within a day or two. That information was in fact provided the Union. The arbitration was initially demanded to be held on February 28, 1994, and an arbitrator had been selected on January 23, 1994. The arbitration was scheduled for June 10, 1996, but was resolved the preceding month.

(b) Analysis and conclusions

(i) Subparagraphs 63(g) and (i)

This allegation deals with the request for a list of full-time unit employees, male and female. There is no doubt that the information was relevant to the Union's grievance. I do not find, however, that Erickson told Mathewson that the Respondent would provide such information. And, even were this to

have been so, the quick response of Schwarzkopf seeking a restatement of the request defeats any theory of a violation based on the earlier alleged agreement to provide. There is no disagreement that the information was never provided.

The General Counsel argues the requested information was relevant and was never supplied by the Respondent nor was an adequate explanation: (1) of why it was not supplied and (2) of any alternatives available to obtain the information. The Respondent predicates its defense on two elements. First, the Respondent argues that it has no readily available database or other means of easily compiling a list of full-time employees. Second, the Respondent argues that it well knew the Union knew this fact from—at least—the assertion of Bowen on behalf of the Union in his letter of May 10, 1994, "As we understand it, the company keeps no records of whom it considers only full-time employees."

The Respondent cites Kroger Co, 226 NLRB 512, 513-514 (1976), for the proposition that an employer satisfies its obligation to provide information if it adequately sets forth the reasons why it is unable to comply. That case and others do not hold that a simple response that the employer "keeps no records of whom it considers only full-time employees" is sufficient to meet an information request seeking the names of full-time employees. The Charging Party's cited case, Pacific Maritime Assn., 315 NLRB 24 (1994), is more on point. In that case the information sought—the practice of paying certain job classifications in excess of the contract guarantees—was simply not available: "I don't know that that exists and, from what I've been told, it doesn't." Id. at 26. The administrative law judge. with Board approval, held that, even if the information did not exist in the form sought by the union, there must have been some evidence in the employers possession addressing the issue and therefore the employer's refusal to address the issue in detail violated its duty to bargain in violation of Section 8(a)(5) and (1) of the Act.

I find the instant case is like the situation present in *Pacific Maritime*, supra. Here, the Respondent did nothing beyond rely on the Union's understanding that no separate independent listing of full-time employees existed. It did not answer the Union's renewed request nor address the Union's questioning about the employer's broader record keeping concerning who was full or part time. Such simple stonewalling does not satisfy the employer's obligation under the statute. Therefore the Respondent with respect to complaint subparagraphs 63(g) and (i) violated Section 8(a)(5) and (1) of the Act.

(ii) Complaint subparagraph 63(t)

All the elements of complaint subparagraph 63(t) were part of the Union's information request of July 26, 1994, and the items sought are preemptively relevant for the Bernard grievance. The General Counsel and the Charging Party argue that this is simply another example of the Respondent, without justification or excuse, withholding relevant information to undermine the Union.

The Respondent argues that Erickson's letters of January 1995, suggests, and the remaining record evidence does not conclusively indicate otherwise given the burden of proof the General Counsel bears, that the materials responsive to requests

³⁶ Yost testified that at relevant times the Respondent did not have a central data base of full-time employees.

(i), (ii), and (iii) were submitted to the Union at the end of January or the beginning of February 1995.

Respecting the request of complaint subparagraph 63(t)(iv) for: "the names, positions, business telephone numbers and addresses of all witnesses" the Respondent argues it has no obligation to disclose such information citing *California Nurses Assn.*, 326 NLRB 1362 (1998).

The Board in that decision held: "[I]t is well settled that there is no general right to pretrial discovery in arbitration proceedings. *Tool & Die Maker's Lodge 78 (Square D Co.)*, 224 NLRB 111, 112 (1976); *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), enf. denied on other grounds 648 F.2d 712 (D.C. Cir. 1981)."

The Respondent invokes the unfortunate circumstances of Erickson's demise, the delay of the Government in ripening the instant litigation, and the lack of specificity of the Union's evidence that part of the information requested by the Union as alleged in complaint subparagraphs 63(t)(i), (ii), and (iii) were not turned over until 1996. This is a fair argument. The Respondent's argument does not however address the delay from the requesting date of July 26, 1994, through January 1995, and the simple lack of response of the Respondent until Erickson's letter of January 1995. That delay clearly violates Section 8(a)(5) and (1) of the Act and I so find. Given all the circumstances, in this narrow setting and circumstance, particularly since the violation has been found and the grievance was withdrawn, I find it unnecessary to determine if a violation continued beyond early 1995. The remedy is essentially unaffected by this more limited finding. To that extent, then, complaint subparagraphs 63(t)((i), (ii), and (iii) are sustained.

The Respondent's cited *California Nurses Assn.* case is persuasive respecting complaint subparagraph 63(t)(iv). The Respondent was not obligated to provide to the Union the equivalent of arbitral discovery, i.e., the Union was not entitled to its requested "names, positions, business telephone numbers and addresses of all witnesses Respondent intends to have testify at the hearing on this matter or who have knowledge of this matter." This allegation shall be dismissed.

- (5) Complaint subparagraphs 63(j) and (k) Complaint subparagraphs 63(j) and (k) allege:
 - (j) Since about June 3, 1994, UFCW 7, in writing, requested that Respondent provide the following information relating to Grievance 23-94 involving Robyn Gillham:
 - (i) the personnel file of Robyn Gillham;
 - (ii) the reasons for the grievant's termination and the information considered or relied upon in making the decision to terminate:
 - (iii) the name, position, business telephone number and business address of each individual who participated in the decision to terminate Robyn Gillham, a list of witnesses and a copy of any and all written statements or memos or oral statements made by them, including any statements made by the grievant;
 - (iv) all personnel manuals, personnel policies or other documents which set forth the Company's absenteeism policy and the potential punishment for violations of said policy;

- (v) a written summary of "nondocumented" evidence obtained and relied upon by the Respondent;
- (vi) documentation of any formal counseling or advisement of Respondent's policies regarding problems with absenteeism:
- (vii) the names, telephone numbers and addresses of all employees who have failed to return to work for several weeks after an automobile accident and who have not been terminated during the period May 1, 1993 to June 3, 1994 including the reasons they were not terminated;
- (viii) the names, telephone numbers and addresses of all employees who have failed to return to work for several weeks after an automobile accident and who have been terminated during the period May 1, 1993 to June 3, 1994 including the reasons they were terminated;
- (ix) the names, telephone numbers and addresses of each employee who received three (3) or more unexcused absences and who were not terminated during the period May 1, 1993 through June 3, 1994 and the circumstances under which the absences occurred;
- (x) copies of any and all disciplinary actions administered to employees, other than the grievant, for absences of three (3) consecutive days or more from May 1, 1993 through June 3, 1994;
- (xi) copies of any and all personnel manuals, personnel policies or other documents which set forth the Respondent's discipline procedures.
- (k) Since about on June 8, 1994 UFCW 7, in writing, requested, in relation to Grievance 23-94, that Respondent provide copies of each medical statement, report and/or excuse provided to the Respondent by Robyn Gillham regarding her motor vehicle accident and subsequent termination

On November 5, 1993, the Union filed a grievance respecting Robyn Gillham who had been terminated. By letter dated November 17, 1993, the Respondent through Freckleton denied the grievance. The letter asserted:

My investigation disclosed that Ms. Gillham was a no call/no show for her scheduled shifts on August 29, September 4, 5, 11, 12, 18, 1993. Sometime around September 18, Mr. Woodside heard from Ms. Gillham. She stated she had been in a car accident and didn't know if she should return to work. Mr. Woodside instructed her to call Mr. Stachofsky the next morning and that she would need a doctor's note explaining her absence. It was not until approximately October 20, 1993, that Ms. Gillham spoke to Mr. Stachofsky. He told her to come in to see him and to bring a doctor's note with a copy of the accident report. It was not until October 27, 1993, that she got back to Mr. Stachofsky. At the time, she was told she had been terminated for abandonment of job. As an aside, we have since been informed that during the time Ms. Gillham was not showing up for her shifts at Store No. 875, she was employer at McDonald's. In view of the above, we do not believe the Bargaining Unit Agreement has been violated, nor do we believe the remedy you requested is required.

On March 31, 1994, the Respondent requested John Mathewson to provide it a copy of Gillham's letter, a copy of

the accident report and a doctor's note.³⁷ By letter dated June 3, 1994, Parsley of the Union sent Freckleton a list of requested information "in order to prepare the case for arbitration." Included in the list of seventeen requested items were the 11 alleged in complaint subparagraphs 63(j)(i) through 63(j)(xi). On June 8, 1994, Parsley requested of Erickson the information set forth in complaint subparagraph 63(k). On September 15, 1994, the instant charge was field.

Erickson wrote Parsley on January 13, 1995, reviewing various outstanding union information requests including the Gillham matter. The letter states that enclosed with it is Gillham's personnel file and relevant statements relating to his case. The Union through counsel Bowen testified that these documents were not in fact received at that time but rather were received later at some indeterminate time.

With his letter dated June 2, 1995, to Bowen with copy to Freckleton, the Respondent's outside counsel handling the Gillham arbitration, David Wuthrich, sent various documents to the Union regarding the Gillham arbitration. Bowen identified these documents as being the only documents received from the Respondent relevant to the information request other than the personnel file of Gillham. The information comprised a doctor's note, management statements, work schedules, timecard reports and a report on hours paid.

At the threshold there was argument respecting when the information that came to the Union was in fact received. Bowen testified that some information arrived subsequent to the dated transmittal letters of the Respondent's agents on January 13 and June 2, 1995, Although he was unable to identify precisely when it had been submitted. The Respondent argues that the Union's record-tracking practices and procedures were sufficiently erratic and nonrigorous so that there is no fair basis to believe—contrary to Bowen—that the information was not submitted in the transmittals identified. The Counsel for the General Counsel notes however, in their brief at 201 footnote 147, that even if the information is found to have been supplied with the transmittals, the production was still 7 months after the request and clearly unreasonably delayed.

The General Counsel and the Charging Parties argue that the information sought met the Board and courts' tests of being potentially or probably relevant to the Union's inquiry. They note that the Respondent did not respond in a timely manner to the requests and to the extent it wished to question or discuss provision of certain information, it was obligated to do so and could not simply be nonresponsive to the request.

The Respondent argues that the requests, set forth in the complaint, were overly board and that the Union's requests included even broader requests not included in the complaint. Thus, it contends that some of the requests such as items 8 though 16 had no limitation on geographic scope and would have involved all facilities. The Respondent also notes that it is not obligated to produce witness statements citing *Anheuser*-

Bush, 237 NLRB 982, 984–985 (1978). Further, the Respondent emphasizes that—well before the information requests—in its November 17, 1993 letter, set forth in substantial detail the results of the Respondent's investigation as well as the recitation of the relevant dates and conduct involved.

It is appropriate to address the separate complaint subparagraphs as follows. Respecting complaint subparagraph 63(j)(i) and the request for the personnel file of Robyn Gillham, there is no question that the request was relevant, narrow, and not responded to until at least January 13, 1995. This was 7 months after the June 3, 1994 request and after the filing of the unfair labor practice charge involving the request. I find the dispute over when thereafter the file was supplied is immaterial to the violation and the remedy. The Respondent in delaying the provision of the file until at least January 1995, violated Section 8(a)(5) and (1) and I so find.

Respecting complaint subparagraph 63(i)(ii) describing the request for the reasons for the grievant's termination and the information considered or relied upon in making the decision to terminate; complaint subparagraph 63(j)(iii) describing the request for the name, position, business telephone number, and business address of each individual who participated in the decision to terminate Robyn Gillham, a list of witnesses and a copy of any and all written statements or memos or oral statements made by them, including any statements made by the grievant; subparagraph 63(j)(v) describing the request for a written summary of "nondocumented" evidence obtained and relied upon by the Respondent; and complaint subparagraph 63(k) describing the request for copies of each medical statement, report and/or excuse provided to the Respondent by Robyn Gillham regarding her motor vehicle accident and subsequent termination, I find as follows.

I agree with the Respondent that some of the information requested in these subparagraphs of the complaint was earlier described in the Respondents initial letter to the Union on November 17, 1993. I also agree that the Respondent's request for the doctor's letter made on March 31, 1994, supplied at least a suggestion to the Union that it did not have some of the materials requested. I do not find however that these circumstances. or indeed that fact that the Union clearly in other respects was making unduly broad requests, allowed or justified not responding at all to the request. The obligation of an employer generally and the Respondent in particular in this setting and circumstance is to respond to the request informing the Union of what it had and did not have. By not doing so, Respondent violated Section 8(a)(5) and (1) of the Act. An exception to this obligation, as the Respondent correctly points out, is the request for witness statements. That portion of complaint subparagraph 63(j)(iii) addressing statements is without merit and will be dismissed.

Respecting complaint subparagraph 63(j)(iv) describing the request for all personnel manuals, personnel policies or other documents which set forth the Company's absenteeism policy and the potential punishment for violations of the policy; and complaint subparagraph 63(j)(vi) describing the request for documentation of any formal counseling or advisement of Respondent's policies regarding problems with absenteeism; complaint subparagraph 63(j)(xi) describing the request for

³⁷ The request is established by Erickson's letter dated January 13, 1995. In light of the unavailability of Erickson at all times material herein and the lack of alternative sources of proof in the context of the entire record and the substantial argument of the parties on the issue, I have received this factual assertion for the truth of the matter.

copies of any and all personnel manuals, personnel policies, or other documents which set forth the Respondent's discipline procedures, I find the Respondent could not simply ignore the request. It may well be that the Respondent believed that the Union had all the information requested. Nonetheless, it was obligated to contact the Union and confirm that fact rather than just ignore the request for some 7 moths and until a charge had been filed. I find this conduct violates Section 8(a)(5) and (1) of the Act.

Concerning complaint subparagraph 63(j)(vii) describing the request for the names, telephone numbers, and addresses of all employees who have failed to return to work for several weeks after an automobile accident and who have not been terminated during the period May 1, 1993, to June 3, 1994, including the reasons they were not terminated; complaint subparagraph 63(j)(viii) describing the request for the names, telephone numbers, and addresses of all employees who have failed to return to work for several weeks after an automobile accident and who have been terminated during the period May 1, 1993, to June 3, 1994, including the reasons they were terminated; complaint subparagraph 63(j)(ix) describing the request for describing the request for the names, telephone numbers, and addresses of each employee who received three or more unexcused absences and who were not terminated during the period May 1, 1993, through June 3, 1994, and the circumstances under which the absences occurred; complaint subparagraph 63(j)(x) describing the request for copies of any and all disciplinary actions administered to employees, other than the grievant, for absences of 3 consecutive days or more from May 1, 1993, through June 3, 1994; and complaint subparagraph 63(j)(xi) describing the request for copies of any and all personnel manuals, personnel policies, or other documents which set forth the Respondent's discipline procedures, I find as fol-

These requests—as the Respondent correctly argues—could be interpreted to seek information respecting the Respondent's entire retail operation and could therefore be fatally broad. It is also reasonable however to read the request for information as addressing only the single store or the bargaining unit. The Respondent was obligated to respond at least respecting the information at the store in question or, in the alternative, to inquire of the Union respecting the breadth of the request. If in fact the requests were as broad as the Respondent argues, the Respondent could properly have addressed those issues with the Union, as discussed elsewhere in this decision, respecting relevance, cost and burdens of information gathering. A simply refusal to respond its not sufficient under the cases and the statute. I find therefore that as to these complaint subparagraphs the Respondent has violated Section 8(a)(5) and (1) as alleged.

(6) Complaint subparagraphs 63(l) and (n) Complaint subparagraphs 63(l) and (n) allege

(I) On various dates including June 27, 28 or 29, 1994 UFCW 7 orally requested that Respondent provide a copy of the write-up for grievant's first violation in relation to Grievance 557-94 involving Zona Kryger.

(n) Since about July 1, 1994 UFCW 7, in writing, requested that Respondent provide a copy of Zona Kryger's first write-up for an "off the clock violation" in relation to Grievance 557-94.

These complaint allegations were the subject of a Motion for Summary Judgment and Order Granting in Part and Denying in part the Respondent's Motion for Summary Judgment dated, November 26, 1999. In that order, inter alia, I held that the General Counsel had met his burden of proof regarding two elements: first that the information requests pled in complaint subparagraphs 63(l) and (n) in fact were made and, second, that the Respondent did not provide the information until mid-January 1995. I consider anew the arguments of the parties given the different stage of the proceedings.

The evidence respecting the information request is a letter dated, July 1, 1994, from Local 7 Counsel Parsley to the Respondent's counsel, Schwarzkopf. The letter is captioned: "Follow-up on discussions of June 27, 28, 29, 1994, Outstanding Grievances." The text of the letter is a grievance-bygrievance recitation of purported grievance discussions and agreements. The Zona Kyger termination grievance of March 11, 1994, is the third grievance listed. The sole substantive entry is: "Please provide a copy of Kryger's first write-up for an off-the clock violation." I find that the letter itself is the July 1, 1994 request and establishes directly that the information request alleged in complaint subparagraph 63(n) was made. A more subtle issue is whether the recitation of the letter fairly established that the same request was made a few days earlier to the Respondent. I find that the letter does not carry the burden the General Counsel carries to establish every element of his case. I fair reading of the letter as a whole does not fairly indicate that the bare entry quoted above was a recapitulation of a request earlier made or simply the Union's position given the earlier meetings. Complaint subparagraph 63(1) is therefore dismissed.

The evidence respecting provision of the requested information is the oft referred to Erickson letter, the General Counsel's Exhibit 218 dated January 13, 1995, from Beverly Erickson, contract administrator of the Respondent, to Colleen Parsley. The body of the letter starts out with the assertion: "I have set out below responses to your information requests." The letter then lists 15 numbered items of which number 4 asserts: "Zona Kryger (557-94)—I have enclosed the information regarding the 1st off the clock offense."

I find that Erickson's response read in the larger context of its drafting and in conjunction with other charges discussed elsewhere in this decision fairly allows the inference that she was supplying the information to the Union because it had not been supplied. The Respondent urges that the inference not be drawn given the fact that Erickson death has deprived the Respondent both of the ability to properly investigate the facts and further denied it any ability to put on evidence respecting whether or not the information had already been provided the Union. Having considered the Respondent's arguments in this regard, I remain of the view that it is appropriate to draw the inference and make the finding that the Respondent had not provided the information until January 13, 1995.

. . . .

There is no issue that the information sought was irrelevant to the grievance or evidence or contention that a position was asserted by the Respondent to the Union that the information was not disclosable for any reason in law. I have found the information was requested on July 1, 1994, and was not provided till mid-January 1995. The delay is unexcused and unreasonable. In so delaying its response, the Respondent violated Section 8(a)(5) and (1) of the Act.

(7) Complaint subparagraph 63(o)

Complaint subparagraph 63(o) alleges:

(o) Since about July 1, 1994 UFCW 7, in writing, requested that Respondent provide information showing the number of uniforms which Respondent has historically provided to bargaining unit employees and a copy of the "new dress code policy" in relation to Grievances 575-94, 576-94, and 577-94.

This complaint allegation was the subject of a Motion for Summary Judgment and my order granting in part and denying in part the Respondent's Motion for Summary Judgment dated, November 26, 1999. In that order, inter alia, I held that the General Counsel had not met his burden of proof regarding when the Respondent has provided a copy of the dress code policy. I therefore dismissed the "dress code" portion of this allegation as well as the related complaint subparagraph 63(m). I reaffirm that ruling here.

The remainder of this complaint subparagraph deals with the question of the number of uniforms the Respondent has historically provided represented bargaining unit employees. The General Counsel's proof respecting the Union's request for information is the letter, dated July 1, 1994, from Local 7 Counsel Parsley to the Respondent's Schwarzkopf captioned: "Follow-up on discussions of June 27, 28, 29, 1994, Outstanding Grievances," which contains the entry:

Class Action Grievances—Dress Code, Grievances 572-94, 575-94, 576-94, and 577-94 You directed Bev Erickson to find out historically how many uniforms Albertson's has provided in the past. You offered to provide me with a copy of the new dress policy and check with the Division Office on this matter. Please advise.

Contrary to my view that this same letter did not establish an earlier request in resolving complaint subparagraph allegations 63(1) and (n) immediately above, I find here that the letter's entry respecting uniforms establishes that the Union had asked for information respecting the Respondent's history of provision of uniforms to represented employees and that the Respondent had agreed to provide that information.

Similarly, the General Counsel seeks to rely on General Counsel's Exhibit 218 the Erickson letter of January 13, 1995, as discussed and described above. It contains the entry at item 15:

Miscellaneous Dress Code Grievances—In response to a previous information request, I have already provided a copy of the dress code to Keith Hardin. I am checking to see how many uniforms have been provided in the past and will forward that information on to you.

Again on the same basis as discussed immediately above concerning the earlier complaint subparagraph 63(n), I find this letter is sufficient evidence in to establish that the Respondent, as of January 13, 1995, had not provided the information requested.

There was no dispute that the information requested was relevant to then current grievances respecting employee dress requirements. Having found the request was made and acknowledged on July 1, 1994, and that the information had not been provided until January 1995, or thereafter, I further find the Respondents delay is unreasonable and violates Section 8(a)(5) and (1) of the Act.

(8) Complaint subparagraph 63(p)

Complaint subparagraph 63(p) alleges:

- (p) Since about July 13, 1994 UFCW 7, in writing, requested that Respondent provide the following information relating to Grievance 203-94 involving resets:
- (i) a copy of the letter notifying the Union of a reset at Store # 877 on or about November 2, 1993;
- (ii) the names of the companies who participated in the reset:
 - (iii) a list of the areas and products that were reset;
- (iv) a list of names of witnesses the Respondent intends to have testify at the hearing on this manner.

The Union through Business Agent Keith Hardin on November 18, 1993, filed a grievance respecting the Respondent's use of non-Albertson's employee salesmen to reset products in store #877 without notifying the Union. Freckleton denied the grievance by letter dated December 1, 1993. The matter was not resolved and arbitration loomed.

On July 13, 1994, Parsley requested of Erickson the information alleged in complaint subparagraphs 63(p)(i) through (iv). On August 3, 1994, Erickson responded by letter with the following complete text:

I recently received your request for information regarding the above referenced reset file no. 203-94. As to the specifics of your request.

As I am sure you are aware, the contract does not specify that notification must be in writing or that there is a penalty for non-notification. Obviously you were notified or would not have filed the grievance. Our notices indicate that it was the prepared dinner aisle and that it was the first reset of that section that year. If you have information to the contrary, please send it to me within ten days of receipt of this letter.

The relevant charge was filed on September 15, 1994.³⁸ General Counsel's Exhibit 218, the Erickson letter of January 13, 1995, includes this grievance in its summary of information requests. It contains the entry: "This grievance has been resolved confirmed by Keith Hardin 1/12/95)."

³⁸ The body of charge Case 27–CA–13390, in relevant part, asserts: "Since on or about June 3, 1994, and continuing to date, the above named employer has failed and refused to provide information . . . in the following cases." The instant grievance is listed with others on the charge thereafter.

The information sought by the Union was relevant to the grievance and the arbitration. I find based on the entire record that, other than the Erickson letter of August 3, 1994, there is no evidence that the Respondent supplied information responsive to the request. The General Counsel and the Union argue that the August 3, 1994 letter of Erickson was nonresponsive and did not satisfy the Respondent's statutory obligation to timely provide the requested information and therefore the Respondent violated the Act.

The Respondent makes several arguments. First, it asserts the Erickson letter of August 3, 1994, substantially complied with the July 13, 1994 request. Thus, the Respondent argues that the letter "effectively notified the union that no written notification existed" and "effectively provided the other information sought by stating the reset occurred in the 'prepared dinner aisle'." (R. Br., sec. II, phase 1 cases complaint par. 63 at 51.) Respecting the request alleged at complaint subparagraph 63(p)(iv), the Respondent argues that there is no obligation to provide names of witnesses at an arbitration proceeding citing *California Nurses Assn.*, 326 NLRB 1362 142 (1998).

It is best to deal separately with the individual requests as identified in the complaint and the responses to them. The request for the notification letter alleged in complaint subparagraph 63(p)(i) was met, in Respondent's argument, by the Erickson letter's assertion:

As I am sure you are aware, the contract does not specify that notification must be in writing or that there is a penalty for non-notification. Obviously you were notified or would not have filed the grievance.

Had the Respondent said directly that it did not notify the Union in writing or that no such document existed or that it did not have the document, the request would have been satisfied. Erickson's response, however, is too clever by half and does not in fact definitively address the issue. That being so, I reject the Respondent's argument. In a matter being prepared for arbitration, if not earlier in the process, the party requesting physical evidence—especially regarding a possible document from the authoring employer—is entitled to an answer which provides the document, explains that it cannot be found, asserts that it does not or never did exist or answers that the party is ignorant respecting the matter. I specifically find that Erickson's letter does not respond sufficiently to the request described in complaint paragraph 63(p)(i).

The request for the names of the companies involved in the reset alleged in complaint subparagraph 63(p)(ii) was simply not addressed by the Erickson letter. The request for a list of the areas and products that were reset as alleged in complaint subparagraph 63(p)(iii) was met in the Respondent's argument by the assertion in Erickson's letter: "Our notes indicate that it was the prepared dinner aisle and that it was the first reset of that section that year." The letter is clearly not directly responsive and its reference to "notes" arguably evasive. Nonetheless, in some situations this response might well have been sufficient. But on the record facts relevant to this allegation, in particular given that the letter simply ignored the request for the names of the companies involved, I find the answer is not "effective" notification. The disclosure is not fulsome but rather

begrudging, potentially misleading, and, in conjunction with the refusal to address the other request, insufficient to meet the Respondent's obligations under the Act.

The Respondent is correct that current Board law does not require disclosure of potential arbitration witness names. Therefore it is unnecessary to further address the request for them as set forth in complaint subparagraph 63(p)(iv). That element of the complaint will be dismissed.

Having found the Respondent failed to sufficiently respond to the requests pled in complaint subparagraphs 63(p)(i), (ii), and (iii), it is appropriate to consider the Respondent's two additional arguments. First, it argues that the Union never responded to the Erickson August 3, 1994 letter's closing admonition: "If you have information to the contrary, please send it to me within ten days of receipt of this letter." This failure, in the Respondent's view, should mitigate or even render sufficient the information contained in the Erickson letter for the Union did not question it nor renew its requests. I reject this argument as implying an improper reversal of the burdens and obligations imposed on the parties by the statute. An employer may not excuse or mitigate a refusal to answer an information request from a labor organization representing its employees by appending language to its responding communications inviting the Union to challenge the letter within a set time period.

Second, the Respondent argues that the information request's underlying grievance was settled and therefore the information is no longer relevant to an outstanding matter and the Respondent has no obligation to provide it to the Union. Since there is no record evidence when the grievance was settled—the Respondent places it as at some point between Erickson's August 3, 1994, and January 13, 1995 letters, there is no evidence that the Respondent ever improperly withheld the information and the entire complaint subparagraph 63(p) should be dismissed on that basis. The Charging Party reads the Erickson January 13, 1994 comment: "This grievance has been resolved confirmed by Keith Hardin (1/12/95)," to indicate that the grievance was live until January 12, 1995. (The Charging Party International's brief at 13-14.) The counsel for the General Counsel made it clear she did not contest the fact that the grievance may have been settled before the January 13, 1995 Erickson letter.3

I disagree with the Charging Party that the record establishes that the grievance was settled on January 12, 1995. I also disagree with the Respondent that the record establishes a range of possible settlement dates from August 3, 1994, to January 13, 1995. The specific assertion of the Charging Party's agent on the face of the charge that the information was relevant to a grievance and had not been supplied by the filing date of September 15, 1995, supports the finding which I make, that the information had not been supplied by that date, that the information was relevant to the grievance and that the grievance had not been settled as of that date. I find that the record only establishes

³⁹ Counsel for the General Counsel Josephson asserted: "We're not making an issue, Your Honor, and we will not ask for a finding with respect to whether the grievance was settled before General Counsel's Exhibit 218 [the Erickson January 13, 1995 letter] issued."

lishes that the grievance was settled between September 15, 1994, and January 12, 1995.

What are the consequences of the finding of the "window" of the time of the grievance's settlement to the alleged unfair labor practices? None, in my view. Here I have found facts which sustained the Government's allegations that the Charging Party made a request for relevant information which the Respondent was obligated under the Act to timely respond to, but never did. These findings shift the burden of going forward to the Respondent to establish affirmative defenses that would meet these findings. The fact that a grievance has been settled and the employer is not obligated to supply the information requested of it as of the date of settlement is such an affirmative defense. Therefore, it was incumbent on the Respondent, not the government, to establish the date of such a settlement. The record evidence allows a finding that the settlement was made at least by January 12, 1995. I make that finding. The burden was on the Respondent to establish an earlier date of settlement and it did not do so. I therefore do not find on this record that a settlement took place earlier.

Even were the burden not on the Respondent respecting the date of grievance settlement, the result would be essentially the same. Even were I to assume a settlement could have occurred immediately after September 15, 1994, I reject the argument of the Respondent that such a finding supports a dismissal of the complaint allegations. Under the view of the facts most favorable to the Respondent, the Respondent's obligation to supply the request information remained unsatisfied from July 13, 1994, to at least September 15, 1994, a period of over 2 months and extending until after the Charging Party filed a charge respecting it. Given the totality of the circumstances, i.e., the passage of time, particularly when the Respondent had early on sent a letter to the Union in effect stonewalling the information request without offering any hope or suggestion that more information would be forthcoming, and the fact that the matter was not resolved until after the filing of a charge, I would find the same violations.

Accordingly, based on the record as a whole and the analysis and findings set forth above, I further find the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the request information alleged in complaint subparagraphs 63(p)(i), (ii), and (iii) for an unreasonable time extending to January 12, 1995, or, in the alternative, at least until it had refused to provide the complete information and until after the Charging Party filed a charge respecting the information requests. These complaint allegations are therefore sustained. The Respondent had no obligation under the Act to provide the information requested by the Union as alleged in complaint subparagraph 63(p)(iv), therefore that allegation will be dismissed.

(9) Complaint subparagraph 63(r)

Complaint subparagraph 63(r) alleges:

(r) Since about July 13, 1994, UFCW 7, in writing, requested that Respondent provide the following information relating to Grievance 31-94 involving Steve Spengler:

- (i) the personnel file of the grievant specifically including all documents in the personnel file upon which the Respondent intends to rely;
- (ii) the reasons for the grievant's suspension and the information considered and/or relied upon by the Respondent in making its decision to suspend the grievant;
- (iii) the name, position, business telephone number and business address of each individual who participated in the decision to suspend the grievant;
- (iv) the lists of duties Mr. Spengler received which he allegedly did not complete, which let to his suspension and write-up;
- (v) a list of the duties assigned to each person on the night crew for the time period November 1, 1993 through November 30, 1993:
- (vi) any and all documents evidencing disciplinary action taken against other members of the night crew for failure to perform their job satisfactorily.

Union represented store #868 employee, Steve Spengler, received a disciplinary writeup and suspension on November 9 and 20, 1993. The Union filed a grievance respecting it on December 3, 1993. On December 17, 1993, Freckleton responded to the grievance. Her letter contains the following:

The write-up was issued on November 9, 1993, making this portion of the grievance untimely.

Mr. Spengler was given a one-day suspension on November 20, 1993, for his continued poor job performance. He has demonstrated in the past that he has the capability to finish his duties, however lately he has been sliding. On November 9, 1993, he was given a written warning for not completing his assigned job duties and warned that if his work performance did not improve he could face further discipline.

The matter was not resolved. On July 13, 1994, Parsley wrote Erickson a letter asking "in order to proceed to arbitration" for the items pled in complaint subparagraph 63(r)(i) through (vi). On September 13, 1994, the Respondent's labor relations secretary, Mardee Albright, wrote to Parsley regarding the "Steve Spengler Request for Information dated July 13, 1994." The letter states in part:

Bev Erickson asked me to send you the enclosed copy of the personnel file of Mr. Spengler as you requested. We are gathering the other information and will send it to you as soon as possible.

The personnel file accompanied the letter. Bowen testified that no additional information was provided thereafter by the Respondent. The relevant charge was filed on September 15, 1994

The grievance was later settled. Erickson's summary letter of January 13, 1995, recites the grievance was "Resolved 9/94 grievance meeting." On November 8, 1994, Erickson send the Union a letter captioned grievance settlement and a check made out to the grievant.

The General Counsel and the Charging Party argue the information request was relevant and no basis for delay or non-production existed. The personnel file was not disclosed for 2

months. The remainder of the information was never disclosed despite a charge having been filed. Only the settlement of the grievance ended the matter. The Charging Party and the Government further contend that the grievance was resolved in November rather than September 1994.

The Respondent recurs to the unavailability of Erickson in preparing and consummating its defense. Further it notes that even before the information request the Respondent has given the Union an explanation of the circumstances of the discipline and had supplied at least some documentation.⁴⁰

Dealing with complaint subparagraph 63(r)(i) first, the Respondent took 2 months to provide a photostatic copy of the grievant's personnel file. This is simply too long a time for a clerical task—the Respondent offered no basis for considering the process otherwise. Such a delay is unreasonable and violates Section 8(a)(5) of the Act. The Respondent argues that its earlier disclosure satisfied the requests alleged in complaint subparagraphs 63(r)(ii) and (iii). While it is possible that an argument could be made consistent with the position of the Respondent, the matter is not so clear.

More importantly, however, the Respondent did not take that position in dealing with the Union. Rather the Respondent specifically asserted, in Albright's letter of September 13, 1994, that the other information was being gathered and would be sent to the Union. In such a context, the Respondent's post events argument that the request had been satisfied before it was made cannot stand.

The Respondent further argues that provision of the information became unnecessary when the grievance was settled, which occurrence was in September. While the General Counsel and the Charging Party seek to place the settlement in November, I agree with the Respondent that the record evidence established agreement on the settlement occurred in September. I find however that it clearly occurred after the filing of the September 15, 1994 charge. The withholding of the information for over 2 months—like the withholding of the personnel file—was unreasonably long. Further withholding the information and providing it only after an unfair labor practice charge has been filed substantially reduces the force of any argument that the matter having been resolved with the grievance, should not be viewed as a matter of consequence. I find based on all the above and the entire record herein that the Respondent violated Section 8(a)(5) and (1) respecting all elements of complaint subparagraph 63(r).

- (10) Complaint subparagraphs 63(s) and (w) Complaint subparagraphs 63(s) and (w) allege:
 - (s) Since about July 13, 1994 UFCW 7, in writing, requested that Respondent furnish the following information relating to Grievance 33-94 involving Dean Shawcroft:
 - (i) the personnel file of the grievant specifically including documents upon which Respondent intends to rely;

- (ii) the reasons for the grievant's termination or indefinite suspension and the information considered and/or relied upon by the company in making its decision to terminate or indefinitely suspend;
- (iii) the name, position, business telephone number and business address of each individual who participated in the decision to terminate or indefinitely suspend the grievant:
- (iv) A list of witnesses and a copy of any and all written statements or memos of oral statements made by them including any statements made by the grievant;
- (v) all personnel manuals, personnel policies or other documents which set forth the Respondent's policy on scanning items, giving receipts to customers, the removal of detail tapes and the potential punishment for violations of said policies;
- (vi) a written summary of non-documented evidence obtained by the Respondent and relied upon by it in making its determination to indefinitely suspend and/or terminate the grievant;
- (vii) documentation of any formal counseling or advisement of Respondent policies regarding scanning items, giving customers receipts and/or removal of detail tapes;
- (viii) all personnel manuals or other documents which set forth disciplinary policies;
- (ix) the substance of management and/or security notes and written statements, written or obtained, during the investigation with the actual statements being preferable:
- (x) any written statements or memos of oral statements made by witnesses concerning the incident;
- (xi) the actual tapes or receipts involved in the current matter;
- (xii) the name, address and telephone numbers of any customers involved in the incident.
- (w) Since about June 28, 1995, UFCW 7, in writing, requested that Respondent provide the following information relating to Grievance 33-94 involving Dean Shawcroft:
- (i) the substance of management's notes, security statements, and written statements written or obtained during the investigation resulting in the grievant's termination with the actual statements being preferable;
- (ii) a written summary of non-documented evidence obtained and/or relied upon by Respondent;
- (iii) a copy of the detail tape or complete backup tape of all transactions on the register where the illegal fraudulent transactions occurred on the day in question;
- (iv) the case in/out slips for that register for the day in question;
- (v) all documents and a verbal or written summary of non-documented evidence obtained by the employer and relied upon by it in discharging the grievant;
- (vi) a list of witnesses and a copy of any and all written statements or documentation of oral statements made by them upon which the Respondent relied in making the complained about decision.

⁴⁰ The Respondent notes that Bowen testified that the Union's file contained disciplinary notes that likely were provided at the step-II meeting.

Union represented employee Dean Shawcroft at the Respondent's store #835 was suspended on November 24, 1993, and the Union Agent Dan Zito filed a grievance on his behalf on December 7, 1993. Freckleton responded to the grievance on December 28, 1993, by letter, which included the following text:

My investigation disclosed that on November 24, 1993, Mr. Shawcroft was observed checking out the same customer on at least three (3) occasions and not scanning 12–15 cases of Pepsi each time. He was also observed taking the money the customer gave him and passing it along to a co-worker (the customer's father). When asked why the detail tape could not be found, Mr. Shawcroft admitted to pulling it so no one could see what he had done. Mr. Shawcroft was suspended pending further investigation at that time.

We are nearing the completion of our investigation and will make a determination very shortly.

Shawcroft was terminated on January 25, 1994, and the Union filed a grievance respecting the termination on January 31, 1994

Freckleton wrote to Zito on February 10, 1994. Her letter contained the following:

During the past couple of weeks, you and I have discussed this case on several occasions. On January 20, Mr. Shawcroft, you and I all held a telephone conference and Mr. Shawcroft stated his side of the story. Upon comparing his statements from this telephone call with statements he made at the store earlier and from information provided by co-workers, I found several discrepancies. . . .

Mr. Shawcroft was terminated effective January 25, 1994, for improper check stand procedures and improper cash handling procedures.

The matter was not resolved and on February 28, 1994, the Union notified the Respondent in writing that it was requesting arbitration in various cases including the Shawcroft matter. On July 13, 1994, Parsley sent a letter to Erickson requesting the information pled in complaint subparagraphs 63(s)(i) through (xii). On September 13, 1994, Albright sent a copy of Shawcroft's personnel file to Parsley enclosed with a letter specifically referring to the July 13, 1994 information request, which further stated that the Respondent was "gathering the other information and will send it to you as soon as possible." The relevant charge was filed on September 15, 1994.

On January 13, 1995, Erickson sent the summary letter (GC Exh. 218), stating with respect to the Shawcroft grievance: "I have enclosed the requested information. The reason for the grievant's termination was noted in Albertson's step 2 response dated February 10, 1994."

On June 28, 1995, Bowen wrote the Respondent's outside counsel handling the matter a letter noting that the personnel file had been provided and requesting the information pled in complaint subparagraphs 63(w)(i) through (vi). He testified he was preparing the matter for arbitration and did not have the information he sought. The arbitration was scheduled for September 1, 1995.

On September 1, 1995, the outside counsel firm sent Bowen two documents by facsimile transmission. The first was a 2-page warning given to Shawcroft dated September 14, 1992, and a handwritten note dated January 25, 1994, prepared by the store director of his termination phone conversation with Shawcroft. The second was a four-page collection of witness statements relevant to the events of November 24, 1994. Bowen testified the information received had not previously been provided the Union.

The General Counsel and the Charging Party argue the Respondent as part of a continuing pattern and practice simply did not provide requested information even of the most basic and most relevant kind. The government repeatedly points out that while skilled defense counsel come up with various arguments respecting relevance in the instant proceeding, the Respondent in the actual events simply did not respond to the requests or indicated it would send the information and then did not honor that commitment. What it virtually without exception did not do, and did not do respecting the instant allegation, was contact the Union and discuss or explain its point of view. Such simple obduracy and mendacity, argue the General Counsel and the Charging Party clearly violates the Respondent's duty under the Act and therefore violates Section 8(a)(5) of the Act.

The Respondent argues, as discussed above as to earlier allegations, that it had no obligation to provide the Union with a list of arbitration witnesses and their statements. As found above and on the basis of the cases cited above, I agree with the argument in general. I do not find it applicable to the instant allegations however. Here the Union did not request a list of arbitration witnesses or their statements. Rather the requests go to the provision of the statements of witnesses to the events underling the grieved suspension and discharge. As discussed supra, while there may be reasons an employer may assert to justify withholding names and addresses of customers or, perhaps in some cases, of employees, the burden is on the Respondent to make such an assertion to the requesting union and it clearly did not in this case. Rather the Respondent in the Freckleton letter of February 10, 1993, specifically referred to "information provided by co-workers" in describing the position of the Respondent on the grievances and also in the Albright letter of September 13, 1994, specifically indicated the Union's requested "other information" would be provided as soon as possible. In such a context, there is no basis to hold, and I specifically on this record decline to find, that with respect the requests for witness names and statements, as alleged in complaint subparagraphs 63(s)(iv), (x), and (xii), and (w)(vi), on the particular facts and in the particular circumstances of this situation, the Respondent not was obligated to provide the information. Rather the Respondent was so obligated and in failing to properly respond, violated the Act.

The Respondent also argues that it early on was forthcoming with information respecting the Respondent's basis for the decisions taken. Such assertions are not a basis for reducing the obligations of the Respondent to provide specific requested information. Only, if the specific information later requested has been in fact already been turned over to the Union and that fact is either expressly communicated to the Union or is inherently obvious in context, is earlier disclosure of information

relevant to the allegations herein. In the instant dispute the Respondent did not answer the requests of the Union for information with assertions that the Union had already been provided with all information including documentation that the Respondent had in its possession respecting particular categories of information requested. Rather, the Respondent indicated that the requested information was being compiled and would be sent along to the Union in due course. The Union is entitled under the cases to know if a document or information it requests of the Respondent exists and/or is in the Respondent's possession. This is particularly true as a case comes to arbitration and the Union must contemplate issues of competent evidence.

Applying these principles to the Respondent's argument that Freckleton's initial letter and conversations with the Union agent was sufficient to meet the Respondent's obligation to provide information in response to the Union's requests for information subsequently made of the Respondent, I find the Respondent's argument fails. Were the Respondent to have said in later communications to the Union that Freckleton's February 10, 1994 letter provided all the information the Respondent had or that only the store manager was involved in the decision to suspend, perhaps the argument would be more persuasive. But the Respondent—indeed the Freckleton letter itself as quoted supra-alluded to witnesses and documentary evidence supportive of its case which was never disclosed to the Union. And in all events the Union was entitled to know what information—or additional information—the Respondent had. Therefore, I find that the Respondent's early disclosures did not in any significant way meet or limit the obligations of the Respondent to respond to the Union's information requests.

The final issue for resolution is whether the delay between the July 13, 1994 request and the resolution of the grievance in the latter half of September 1995, more than 14 months later and after the filing of the instant unfair labor practice charge was unreasonable. I find the delay was clearly unreasonable and violated the requirements of the Act. I find therefore that the Respondent violated Section 8(a)(5) and (1) of the Act as alleged in complaint subparagraph 63(s). I reach the same conclusion respecting the later duplicative request as pled in complaint subparagraph 63(w). In that case the request was made on June 28, 1995. Not only was the request a continuing one and the refusal to provide the information a continuing violation, the information was at that point being sought for an upcoming arbitration hearing and the Respondent well knew this was so.

(11) Complaint subparagraph 63(u)

Complaint subparagraph 63(u) alleges:

- (u) Since about July 28, 1994, UFCW 7, in writing, requested that Respondent provide the following information, in relation to Grievance 264-94 involving non-bargaining unit employees performing bargaining unit work:
- (i) the butcher block, deli meat department and manager's schedules for the period beginning December 19, 1993 and ending December 25, 1993;

- (ii) the courtesy clerks' schedules for the period beginning December 19, 1993 and ending December 25, 1993:
- (iii) the names of all employees covered under the meat contract who were unable to perform the butcher block work during the week of December 19–25, 1993 when assistance was needed to perform work;
- (iv) the names of the individuals within the bargaining unit or classification who were asked and refused to perform the butcher block work during the week of December 19–25, 1993;
- (v) documentation of all attempts to extend the shifts of employees already working in the butcher-block area so that work performed by courtesy clerks could have been performed by butcher-block employees during the week of December 19–25, 1993;
- (vi) the results of the investigation which Respondent conducted concerning the subject of the grievance;
- (vii) the names, positions, business addresses and business telephone numbers of individuals who have knowledge concerning this grievance and /or who Respondent intends to call as witnesses.

The Union represents a unit of meat department employees at store #802. The meat department comprises the service deli, meat deli, and butcher block. The Union came to believe that in the pre-Christmas 1993 period, the store had placed troughs of fresh fish on ice and utilized nonmeat department courtesy clerks to staff the trough, weighing, and wrapping the fish.

On January 6, 1994, the Union filed a grievance respecting store #802 asserting that nonbargaining unit people were doing represented bargaining unit work in the week of December 25, 1993. Freckleton responded by letter of January 18, 1994, asking the Union: "[W]hat bargaining unit work and who was doing it." She stated she would investigate if the specifics were timely provided. Union Representative Paul Pearson responded by letter dated February 3, 1994, that, while there were meat contract employees working part time and available the weekend of December 25, 1993, "the store manager had a courtesy clerk doing meat contract work."

On July 28, 1994, Parsley requested of Erickson information respecting the grievance as pled in complaint subparagraphs 63(u)(i) through (v). Two weeks later, Parsley asked Pearson to report on the grievance and he submitted a memorandum on August 12, 1994, specifying the meat department employees available for work and the courtesy clerks doing the work, which was the subject of the grievance. He also indicated he had the schedules for the meat department, butcher block, and deli.

The relevant unfair labor practice charge was filed on September 15, 1994. Erickson in her January 13, 1995 letter (GC Exh. 218) makes reference to this grievance:

I have requested timecards and schedules from the store and will forward to you upon request. Contrary to what your letter states, Mr. Pearson did not respond to my request of January 18 to provide the name of the employee who was called in to work. His letter of February 3 simply states that it was a Courtesy Clerk (there was no name). It has never been de-

termined that any employee was called in out of classification and therefore, no other employee could have lost hours.

Erickson on January 31, 1995, provided the Union with requested information respecting several grievances including the instant grievance respecting which she provided schedule information for the week of December 19, 1993. This information responded to the Union requests pled in complaint subparagraphs 63(u)(i) and (ii). Bowen testified the Union did not receive any additional information from the Respondent regarding this grievance.

It is efficacious to address the information requests as follows. Respecting the requests alleged in complaint subparagraph 63(u)(vii) for "the names, positions, business addresses and business telephone numbers of individuals who have knowledge concerning this grievance and/or who Respondent intends to call as witnesses," I sustain, on the basis of the cases and analysis set forth supra, the Respondent's argument that it has no obligation to provide arbitration witness names and statement

The second category of requests are the requests pled in complaint subparagraphs 63(u)(iii), (iv), and (v) for the names of all employees covered under the meat contract who were unable to perform or who were asked and refused the butcher block work during the week of December 19–25, 1993, when assistance was needed to perform work and documentation of all attempts to extend the shifts of employees already working in the butcher-block area so that work performed by courtesy clerks could have been performed by butcher-block employees during the week of December 19–25, 1993.

These requests are relevant to the grievance and are clearly designed to establish what, if any, efforts the Respondent undertook and what results were obtained in consequence of those efforts, to utilize meat employees for the work in contest. The General Counsel and the Union argue the information was never provided and therefore the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent argues that the grievance and the solicited clarification by the Union was in effect so vague that there was no obligation on the part of the Respondent to address them.

If the Respondent did not understand the grievance and/or the request for information it was obligated to respond with a request for additional clarification. While Erickson's letter of January 1995, may be perceived as such a request, it is impermissible to wait for 5 months and the filing of an unfair labor practice charge before requesting clarification. The refusal to respond earlier was clearly unreasonable and I so find. The Respondent violated Section 8(a)(5) and (1) with respect to complaint subparagraphs 63(u)(iii), (iv), and (v).

The request pled in complaint subparagraph 63(u)(vi) seeks the results of the investigation which Respondent conducted concerning the subject of the grievance. It appears from the record that Erickson never undertook an investigation at least prior to January 1995. The Respondent was under no obligation to investigate the grievance or to disclose to the Union under the broad reach of such a request any aspect which would otherwise be properly sheltered from disclosure. In any such instance, timely communication to the Union of the specifics

would meet the Respondent's obligations under the Act. It may well be argued that it would not have been improper given the facts of this case to have timely asked more from the Union by way of explanation. That issue is not before me since no such further inquiry was made. The Respondent may not however simply fail respond for an unreasonable time to such a request. Silence under such circumstances—especially where the Respondent indicated it would investigate the matter if it got additional information that was supplied—is unreasonable and violates the requirements of Section 8(a)(5) of the Act and I so find.

The requests pled in complaint subparagraph 63(u)(i) and (ii) seek staff work schedules for the period beginning December 19, 1993, and ending December 25, 1993. The Respondent argues that these documents were early on in the possession of the Union and most likely were provided by the Respondent's store staff before they were requested. Until January 1995, the Respondent's Boise labor relations staff had not provided this information to the Union. It is also clear from her correspondence that Erickson did not believe at that time the information had been provided. It is also clear however that by August 1994, the Union had copies of work schedules.

The Respondent argues that this information should be found to have come from the Respondent's store level agents thus satisfying the Respondent's obligation to provide the information. The issue here is the testimony of Pearson respecting where and from whom he obtained the documents. Based upon the entire record herein including the demeanor of Pearson during his testimony. I find that there is insufficient evidence to conclude that the schedules were provided by the Respondent's agents. If the Union had obtained the schedules through surreptitious photocopying or other means, it could still properly ask the Respondent for the schedules to obtain reliable evidence and documentation that would be more readily submitted to and received by an arbitrator. I further find that, given that it has not been established that the Respondent provided the schedules, that the Respondent did not fulfill its obligation to provide the information until January 1995. Since that date was approaching half a year after the request was made, I find the delay in provision violates Section 8(a)(5) and (1) of the Act.

(12) Complaint subparagraph 63(v)

Complaint subparagraph 63(v) alleges:

- (v) Since about August 3, 1994, UFCW 7, in writing, requested that Respondent provide the following information in relation to Grievance 279-94 involving Adam LePore:
- (i) the personnel file of Adam LePore, including all documents in said file which the Respondent intends to rely upon in the arbitration of this matter;
- (ii) all personnel manuals and/or documents which set forth the disciplinary policy of Albertson's the policy concerning employees in the meat department weighing their own meat, marking their own produce and wrapping their own product, the manner in which meat products can be wrapped when being sold to an employee, employees operating the machines which have department codes in

them, and employees purchasing products on company time:

- (iii) security notes and written statements obtained during the investigation or their substance;
- (iv) a list of witnesses who have knowledge of the subject matter of the grievance and/or who may be called by the Respondent to testify in this arbitration, copies of any and all written statements or memos of oral statements made by them including any statements made by the grievant:
- (v) a written summary of all non-documented evidence obtained and relied upon by the Respondent;
- (vi) any written statements or memos of oral statements made by witnesses concerning the incident for which the grievant was suspended;
- (vii) the names and positions of all other employees who were disciplined during the period November 1, 1993, to August 3, 1994, for similar or the same offenses as Mr. LePore and the type of discipline imposed upon that employee.

The Union filed a grievance on December 10, 1993, challenging the suspension of represented store #851 employee Adam Ray LePore. The matter was not resolved. On August 3, 1994, Parsley sent Erickson a letter seeking information on the grievance "necessary for the Union to proceed to arbitration." The seven requests are set forth in the complaint subparagraphs 63(v)(i) through (vii).

On September 13, 1994, Albright, asserting it was at Erickson's request, sent a letter to the Union referencing the August 3, 1994 information request, enclosing at a copy of LePore's personnel file, and stating that the Respondent was gathering the other requested information and would send it along as soon as possible. The relevant charge was filed on September 15, 1994. In General Counsel's Exhibit 218, the January 13, 1995 status letter of Erickson, she refers to the LePore grievance as follows:

You have already been sent Mr. LePore's personnel file. I have enclosed statements and relevant documents from Albertson's Company Policies. We have no knowledge of any other employee disciplined for the same offense as Mr. LePore during the time period November 1, 1993, to present.

The General Counsel and the Charging Party argue that there was no excuse offered for the delay in providing the requested information and that the 40-day delay in providing the personnel file and the over 5-month delay in providing the remainder of the requested information, was unreasonable and violated Section 8(a)(5) of the Act.

The Respondent argues that it is not obligated to provide lists of arbitration witnesses and/or their statements. Based on the analysis supra, I agree. Those portions of the requests of complaint subparagraph 63(v)(iv) will be dismissed. The Respondent further argues it was not obligated to produce witness statements gathered as part of an investigation of employee misconduct citing *Fleming Cos.*, 332 NLRB 1086 (2000), and *Anheuser-Busch*, 237 NLRB 982, 984 (1978). I agree and therefore will dismiss complaint subparagraph 63(u)(vi).

Respecting the remainder of the requests, the Respondent proffers the previously discussed defense that it was unable to investigate the matter or adduce potentially supporting evidence due to Erickson's unavailability. I have found supra, that her unavailability is not a defense to an otherwise clear violation. Here, the 5 weeks taken to provide a photostatic reproduction of a document at all times in the Respondent's possession was unreasonable. The longer delay respecting the other requested material—even after the Union was assured it was being gathered—was also unreasonable. Accordingly, I find the remainder of requests as described in complaint subparagraph 63(v) were improperly and unreasonably delayed and the delay violated Section 8(a)(5) of the Act.

(13) Complaint paragraph 66

Complaint paragraph 66 alleges:

- (a) Since on about September 21 and 26, and October 12, 1996, a representative of UFCW 7, at Respondent's Aurora, Colorado store, orally requested that Respondent furnish UFCW 7 with copies of the "paperwork" relating to the cash register drawer used by employee Ronald Wilson on the days for which he was issued disciplinary suspensions.
- (b) Since on or about October 12, 1996, representatives of UFCW 7 orally, at Respondent's Aurora Colorado store and, on October 28, 1996, in writing, requested that Respondent furnish to UFCW 7 "safe sheets", "yellow till sheets", "detail tapes" and "over and short lists" for all employees at Respondent's Aurora, Colorado store, from September 1 through October 13, 1996.
- (c) Since on about October 7, and 15, 1996, UFCW 7, in writing, requested that Respondent furnish to UFCW 7 any and all information reviewed and relied upon in making the decision to issue Ronald Wilson three day and one week suspensions.
- (d) On February 3, 1997,UFCW 7, in writing, requested that Respondent furnish to UFCW 7 any and all information used in making the decision to terminate Ronald Wilson including credit card information for a specific December 26 transaction.
- (e) The information requested by UFCW 7, as described above in paragraph 66(a)–(d) is necessary for, and relevant to, UFCW 7's performance of its duties as the exclusive collective-bargaining representative of the Denver Grocery Unit described above in paragraph 6 and is a mandatory subject for the purposes of collective bargaining.
- (f) Since about the dates specified in paragraphs 66(a)–(d) above, and for an unreasonable time thereafter, Respondent, by its agents including Christopher Yost, Kathryn Bush and Steven Marzolf, has delayed, failed and refused to furnish UFCW 7 with the information requested by it as described above in paragraphs 66(a)–(d).

Ronald Wilson was a represented employee at Respondent's store #859 in Aurora, Colorado. On September 21, 1996, he was suspended for a day for alleged cash register shortages. The Union through Representative Brad Gossett met with Store

Manager Dallas Slagle on September 23, 1996, for a step-1 meeting. Gossett testified that he asked Slagle for the specifics of the shortage and the underlying "paperwork" and was told by Slagle that he would have to get the paperwork from Boise. Viewing that as unsatisfactory, Gossett filed a grievance on September 23, 1996. Slagle did not testify.

On September 26, 1996, Wilson was suspended for 3 days for additional cash register shortages. Gossett filed an additional grievance dealing with this suspension on October 10, 1996. The grievance claimed that Wilson was suspended for shortages, which occurred when he was on break and lunch by "one or more people" who had access to his register. On the grievance form sent to Boise the Union requested "any and all information reviewed and relied upon concerning this issue."

On October 13, 1996, Wilson was suspended for a week for cash shortages. On October 14, 1996, Gossett testified he again met with Store Manager Slagle and testified he asked to be shown how Slagle knew Wilson was "short," but the manger told Gossett he could not do that. On October 15, 1996, Gossett filed a grievance respecting this third suspension. On its face it sought "any and all information used in making the decision to suspend Mr. Wilson."

Bush testified that soon after receiving the two grievances with the information requests noted, she contacted the store manager and asked that he send her information that he relied on to issue the discipline to Ron Wilson.

On October 28, 1996, Gossett wrote to Bush "formally requesting any and all information used" in the three disciplinary suspensions. It specifically requested "all safesheets, yellow till sheets, detail tapes, over and short lists for all employees for the period September 1 through October 13, 1996." The Boise office date stamp receipted its copy: November 1, 1996.

Eileen Leech, a retail store bookkeeper, at relevant times working at store #859, testified that as part of her regular duties she monitored checker transactions and cash management. When she discovered shortages, she gathered and prepared the standard underlying paperwork documenting the cash shortages and reported the occurrence to the store manager. She testified she did so in the case of each of the Wilson shortages under discussion herein. She also testified that on the day of Wilson's initial suspension, he asked for the paperwork associated with the cash shortage at issue. She told him she did not know what she could give him and inquired of her manager. He in turn inquired with Boise.

Leech testified that later that day, September 23, 1996, she had a telephone conversation with Bush and was told by Bush to prepare copies of the relevant documents—with certain redactions respecting credit card transactions—and to provide them to Gossett. Leech thereafter did in fact prepare and photo reproduce the papers comprising in part detail tape equivalents, over and short lists, yellow till sheets, and saved summary safe sheets. These records constituted a thick pile which she placed on her store manager's desk.

She recalled that she left a phone "voice mail" message at Gossett's office for him respecting the documents' availability at the store. When Wilson was suspended a second time, she repeated the copying procedure and added those documents to the stack on the store manager's desk. A few weeks later, she had occasion to talk to Gossett by phone regarding another matter and "reminded" him the documentation for Wilson's first suspension—now augmented by the documentation for the second suspension—were on the store manager's desk. She recalled they were picked up about "a month and a week" after the first suspension i.e., on or about October 28, 1996. Leech testified that although she did not see Gossett pick up the documents, she had a telephone conversation with him soon thereafter in which he sought additional documents-duplicate Card Reports—because he was having trouble with some of the dates in the earlier records. She prepared those additional records the same day as the conversation and delivered them to her store manager. She had also made a duplicate batch of the copied records for the store manager but testified that collection had been stolen sometime after Wilson's termination.

Gossett denied Leech's testimony respecting the documents. He testified to having no recollection of receiving phone calls or phone messages from Leech respecting the availability of these records, nor of discussing the records with her, nor of actually picking up such records at the Respondent's facility, nor of having them in his possession at that time.

The Union filed the relevant charge on November 6, 1996. On November 27, 1996, Bush wrote Gossett defending the Respondent's suspensions and providing the warning notices and the daily operator cash report for the dates of alleged shortages associated with the suspensions. Gossett testified that immediately after receiving this letter and the documents accompanying it—which he asserted were the first documents he had received, he determined he could not conclude his investigation without the additional documents he had earlier requested, but not as yet received. He testified that he then contacted Bush by telephone several times:

I told Bush that I'd received, you know, the documents that she sent me and I told her that I still needed more, that I'd still like to have the safe sheets and the over and shorts and the yellow sheets, and she asked me, you know, well, why do you need these, and I explained to her, you know, what my purpose was with them and I explained to her, you know, how the accounting system worked, you know, and that I needed them to show that the money just wasn't misplaced and that I still believed that the money was there in the store and it actually wasn't missing.

Gossett recalled that Bush responded that she would have to talk to her supervisor, Yost, and would get back to him.

Gossett's notes of a December 23, 1996 conversation with Bush reflect that in that call he indicated he needed more information, including credit card transaction information and that Bush responded she would check with Yost. Bush recalled a step-2 grievance phone conference with Gossett and her colleague Steven Marzolf, a contract administrator. She testified, or her notes of the conversation indicated, that Gossett still wanted the information not supplied and that Bush indicated there would be a delay since the information was going to present retrieval problems. She also told Gossett that the store manager told her to direct Gossett to Eileen Leach the bookkeeper for "other info" including safe sheets. Bush testified

that her superior, Yost, made the decision to supply the information to Gossett⁴¹ and Marzolf came to be assigned to gather and transmit the information to the store for disclosure to the union agents.

The Respondent suspended Wilson indefinitely for cash shortages on December 27, 1996, and terminated him on January 22, 1997. These later events were also the subject of grievances filed on January 6 and February 3, 1997, and information requests. The Respondent reported to the Union by letter of February 11, 1997, that it was investigating the circumstances of the termination and on February 20, 1997, reported to the Union that the termination was proper. No information was provided relevant to the allegations herein.

On February 28, 1997, Steven Marzolf wrote Gossett: "in response to your letter requesting information from store #859, concerning the chronic shortage problem which led to the termination of Ron Wilson."

The records that you have requested are available for your review at the store. Please contact the Store Director, Dallas Slagle, to set up a mutually convenient time to review the documents. You may copy documents at your expense on the store copy machine.

The actual delivery of the documents to the store, the making of an appointment to obtain the documents and their photo reproduction process was slow and there were delays. At the end of March 1997, Gossett testified he originally got a "pile" of documents which he later found during his review found to be incomplete. He reported on the shortages to Charging Party counsel who sent a request for various documents⁴² to the Respondent's outside counsel preparing the grievance for arbitration on August 13, 1997. The Respondent's outside counsel responded by letter dated, October 14, 1997, providing certain documents and indicating, inter alia, that detail tapes were no longer available since they were only maintained for 180 days and that certain other requested materials were destroyed or were no longer available.

The Union on March 18, 1997, sent the Regional Director for Region 27 of the Board a letter asking to withdraw three charges including the instant charge. That request was never approved by the Regional Director.

The Respondent advances and the General Counsel opposes approval of the withdrawal request essentially on the same basis as has been discussed earlier respecting other withdrawal requests. Based on the identical analysis as that set forth respecting the withdrawal request of the charge underlying complaint paragraph 58, based on the opposition of the General Counsel and the record evidence of the Respondent's history of violations of the Act—particularly respecting Local 7—I deny the motion.

The General Counsel and the Charging Party argue that the refusal to provide documents initially at the store level and the substantial delays in provision of the requested documents are just another example of a repeated course of conduct in delay and obfuscation when dealing with the proper request for relevant information. The Respondent makes a variety of arguments.

First, the Respondent challenges the relevance of the alleged request for documents for the period September 1, 1996, through October 13, 1996. The initial suspension occurred on September 21, 1996. I do not find the request for documents beginning 3 weeks before the discipline is irrelevant. Further and more importantly, the issue of the relevance of the presuspension period was never raised by the Respondent during the events and is therefore foreclosed now. I find the documents requested were relevant in the context of events.

Second, the Respondent argues that the complaint's litany of oral requests of information was not sustained by the evidence. Thus, the Respondent argues that the information requests of September 21 and 26 initially described by Gossett were not specific enough to trigger a disclosure obligation, i.e., Gossett claimed to have asked about the cash shortage, "where it was on the paperwork." The Respondent also asserts Gossett was not credible given his later lack of recollection and his prior inconsistent testimony in his affidavit that he had no recollection of asking for documents. The Respondent further argues that Gossett's testimony regarding the October 12 request failed to establish a request other than the nonspecific demand described by Gossett that the store manager "show me where, how much the safe was over or short."

The Respondent argues that the great bulk of the requested information was initially made available to Gossett at the store level by Leech and actually picked up by Gossett in late October 1996. Thus, argues the Respondent based on Leech's testimony, the Union had what it needed and the Respondent had fulfilled its statutory obligations early on. The General Counsel and the Charging Party challenge Leech's testimony and note that the excuses offered at trial in the instant case were never communicated to the Union during the events in question. Rather Bush, who passed the assignment to gather the requested information for the Union along to a new employee, Marzolf, while she went on vacation, simply did not place any priority at all on its provision. In this regard the Charging Party notes that Bush clearly only took the matter seriously once Wilson had been discharged and a potential backpay obligation was at issue. The General Counsel and the Charging Party recur to their arguments that Boise again referred the Union to the store to obtain information and, inevitably, records were missing and generally incomplete.

The threshold issue is when Gossett obtained the first records from Leech. I reject her testimony that early on, in the period just after the initial discipline Gossett was provided with all the records she described. It is not so much the Leech was incredible in her testimony as she was impeached by the testimony of Bush, which makes Leach's timing highly improbable. Bush, and Gossett, corroborated by notes, agree that, as described above, Bush when pressed by Gossett for additional records indicated she would have to ask Yost if such disclosure was

⁴¹ Bush testified that most of the documentation at issue should not be disclosed directly by store level personnel to the Union without specific Boise labor relations staff authorization.

⁴² Included in the substantial request were records such as detail tapes, total over and shorts, register over and shorts, and other records from various dates including September 9, 11, and 23, as well as October 11, 29, and 31, 1996.

authorized. It is simply not possible that she would have taken that position if she had earlier told store level staff to disclose the information to Gossett. And, of course, if Gossett had the information at that time, he would not have been pressing Bush for the information. I am convinced and find that Leech is simply wrong about her timing. I specifically find that the disclosure processes she recalls were those the occurred following the Respondent's telling Gossett by Marzolf's letter dated February 28, 1997, that Gossett could pick up the records at the store. Her timing may well have been confused by the fact that Bush—as Bush testified—asked the store manager to send her the documentation underlying the suspensions in October. Based on his demeanor, the written communications, the consistent testimony by Bush respecting the timing of events, and the entire record, I credit Gossett regarding when he obtained the information at issue.

Respecting the Respondent's argument that the oral "show me the paperwork" requests of Gossett were not sufficiently specific to trigger a disclosure obligation, I disagree. The uncontradicted testimony of Gossett was that the store manger simply refused his request to be shown the "paper" evidence of the shortages and that the manager did not seek clarification of what was being requested nor explain his refusal to provide the information. The unchallenged requests of Gossett, as credited and described above, were therefore sufficient to put the Respondent under a duty to either question the request or respond.

Gossett's testimony regarding the September 21, 1996 response of the store manager was that the store manager told him he had to get the "paperwork" from Boise. That was not a broad refusal by the Respondent to provide information, but rather a referral of the Union on to a different source of the information. Nor were the store manager's later refusals independent violations since they involved the same information the manager had earlier told Gossett to get from Boise. I find therefore that the store manager's refusals do not constitute a violation of the Respondent's duty to provide the information.

The requests of the Union for information from Boise, however, were specific and the final responses and provision of the information were long delayed—unreasonably so. While the time involved was so long there is no need for buttressing evidence to further support the alleged violations, the original requests for information at the store level, coupled with the final delayed disclosure at the store level, supports the repeated arguments of the General Counsel and the Charging Party that the Respondent's handling of information requests often puts the Union to unreasonable multiple steps and efforts to obtain complete sets of requested information. The records were in Boise and were sent to the store for disclosure—in the sense of allowing the Union to copy the documents—to the Union. This attenuated process-where simply sending the documents to the Union would have been much quicker and easier for all parties—is a further impediment to timely disclosure and a further violation of the Act.

Based on all the above and the record as a whole, I find that the Respondent violated Section 8(a)(5) of the Act by unreasonably delaying and fragmenting its responses to the Union's written requests for information as alleged in complaint paragraph 66. I do not find that the oral requests of the store manager for information were improperly handled in independent violation of the Act.

(14) Complaint paragraph 67

Complaint paragraph 67 alleges:

- (a) On various dates including on December 12, 1996, in writing, and on December 30, 1996, and January 27th, 1997, orally, UFCW 7 requested that Respondent provide the following information relating to the grievances of Teresa Emery, Jesus Ramirez, and Ron Moore at Respondent's stores located in the Denver metropolitan area:
- (i) schedules for the week ending and the specific day that the grievants allegedly sold product to a minor;
- (ii) the name and identity of the persons supposedly used in the "alcohol stings";
- (iii) proper identification and pictures of the persons who conducted the "alcohol stings";
- (iv) proof of the age of the persons who went through the check stands:
- (v) the receipts from all check stands that depict the day, time and check stand number used by the person conducting the "alcohol sting";
- (vi) Respondent's "sting report list" for September 21, 1996, and the days following, compiled by the security department;
- (vii) the report list for "alcohol stings" conducted by John Valence, Tom Walder or whoever was put in charge of the "alcohol stings" on November 21, 1996, and the preceding days:
- (viii) the report on the "alcohol sting" involving Kathy Guetline on September 21, 1996, at Store # 870.
- (b) The information requested by UFCW 7, as described above in paragraph 67(a)(i)–(viii) is necessary for, and relevant to, UFCW 7's performance of its duties as the exclusive collective-bargaining representative of the Denver Grocery Unit described above in paragraph 6 and is a mandatory subject for the purposes of collective bargaining.
- (c) Since about December 12, 1996, and for an unreasonable time thereafter, Respondent through its agents including Kathryn Bush has delayed, failed and refused to furnish UFCW 7 with the information requested as described above in paragraphs 67(a)(i)–(viii).

Local 7 represented employees at store #0875 in Westminster, Colorado, including Theresa Emery who received a 2-week suspension on September 26, 1996. It also represented employees of store #0811 in Westminster including Jesus Ramirez who received a 2-week suspension on September 17, 1999, and represented employees of store #0872 in Westminster including Ronald Moore who was suspended on November 30, 1996. These suspensions arose out of a "sting" in which the employees were suspended for allegedly selling alcohol to an underage purchaser. In each case the Union filed a grievance challenging the suspension and met with store based management. The store-based representative referred the Union's requests for information to Boise.

By letter dated, December 12, 1996, Steve Dominguez, the union representative handling these matters wrote to Bush seeking the items alleged in complaint subparagraphs 67(a)(i) through (viii). Respecting the request for the Guetline report, the letter stated: "It is said that she sold to a minor but did not receive a two week suspension."

In a telephonic step-2 meeting with Marzolf, respecting the Ramirez suspension, Dominguez asked for photographs and identification of the purchaser and the transaction receipt. On January 15, 1997, Dominguez sent a letter to Bush repeating the December 12, 1996 requests as to Emery.

On January 27, 1997, Bush, Marzolf, and Dominguez held a telephonic step-2 meeting respecting these grievances. Bust told Dominguez in her memory:

I advised Mr. Dominguez that we had an agreement, that Chris Yost and Gary Hakes had an agreement that information requests would not be submitted to Labor Relations until a case has been set for arbitration. I also advised him that information such as the schedule that he was requesting in number one could be obtained directly from the store.

He told me that he wasn't aware of any agreement between Gary Hakes and Chris Yost but that he would look into that and that he would get the case submitted to EGC and proceed to arbitration.

Dominguez recalled:

Again I had asked why [Bush] had not responded and given me any information on my written requests. And, she said that the information did not have to be sent out immediately. That there was an agreement between her an Mr. Yost that—I mean not her. An agreement between Ernie Duran and Mr. Yost that the information did not have to be sent out until it went to arbitration or something.

The Union filed the charge respecting this matter on December 10, 1996. Dominguez sent Bush a letter dated, February 11, 1997, in which he informed Bush that the Union agreement with Yost did not apply to providing information to union representatives and enclosed an internal memorandum dated December 7, 1997, with the handwritten notation from Duran that the union agreement with Yost applied to attorney requests for information and not union representative requests. On March 13, 1997, Bush sent Dominguez "all documents" relating to the liquor stings. There is no dispute this response addressed the requests. On March 18, 1997, the Union sought to withdraw the unfair labor practice charge filed respecting these events. The Regional Director did not approve the withdrawal request.

The General Counsel and the Charging Party argue that the information was relevant to the grievances, specific, readily obtainable and unreasonably withheld from December 1996, to March 1997, by the Respondent in violation of Section 8(a)(5) of the Act.

The Respondent argues a specific agreement between Hakes and Yost was in force relieving the Respondent of any obligation to respond to the information requests short of arbitration. It argues further that it fully complied with the requests in its March 13, 1997 response, that the timeliness of this response in

the totality of the circumstances was not unreasonable, and that the Union was not prejudiced in anyway by the March provision of the information. Finally, the Respondent argues the Union's withdrawal should be approved.

The threshold issue is whether or not the withdrawal request should be approved and the matter closed without further inquiry into the merits of the allegations underlying the charge. The Respondent advances and the General Counsel opposes approval of the withdrawal request essentially on the same basis as has been discussed earlier respecting other withdrawal requests. Based on the identical analysis as that set forth respecting the withdrawal request respecting the charge underlying complaint paragraph 58, based on the opposition of the General Counsel and the record evidence of the Respondent's history of violations of the Act—particularly respecting Local 7—I deny the motion.

The second matter to discuss is the scope and applicability of the disputed Hakes-Yost agreement. Yost testified that early on in his service with the Respondent he met with Hakes, then the President of Local 7, in late March or early April 1995, to discuss the burgeoning backlog of grievances and information requests between the two. Yost sought from Hakes an agreement prioritizing the needed work. He testified:

I explained that I needed to have his assistance in forgoing or having his business agents forgo information from the Labor Relations Department. This had nothing to do with store level requests. . . .

Yost recalled that an oral agreement was reached in which:

[A]ll information requests from Local 7 concerning grievances would not be made until such time as a case and a pending backlog was going to go forward to arbitration. In other words, the time that we had selected—actually selected—an arbitrator and the case was proceeding and that is both with respect to the legal department requests and also with respect to the business agent requests, but that, you know, obviously, store level requests would continue to be made and responded to as they had in the past.

Yost recalled that Hakes agreed to notify Local 7's director of legal services, Ernie Duran, and the business representatives that the agreement was reached, but that it was to have no impact on store level requests and that business agents could obtain routine and readily available information at the store level.

Hakes testified to a brief meeting with Yost in late March 1996, in which Yost "asked for some relief from the legal department on information requests" and discussed other aspects of the grievance backlog. He specifically denied he entered into an agreement or would ever enter into an agreement with the Respondent that limited union representatives to asking for information at the store as opposed to asking for information at the headquarters' labor relations department level because he well knew that the stores would always refuse to provide information unless and until headquarters labor relations staff approved. Rather he recalled the two agreed to limit the legal department requests for information and instructed his Legal Department head to confirm his agreement in writing.

On April 7, 1995, Duran sent a letter to Yost with the following text in part:

This shall serve to confirm our conversation on today's date.

The requests for information which I have sent since January 1995, to date can be disregarded. Further, at least until the backlog is resolved, the legal department will not request information until an Arbitrator has been selected to hear the case. Union Representatives can still secure relevant information at store level. Further, information will be shared at the settlement meetings held between the parties.

The General Counsel and the Charging Party vigorously challenge the Respondent's broad claims respecting the reach of the oral agreement which they contend was limited to establishing a protocol for grievances in the Union's legal department being processed incident to arbitration. They argue that the Respondent too must have understood it was a limited agreement for Yost never raised the agreement with the Union and the only time the agreement was ever raised as a basis for not answering an information request was by Bush regarding the instant allegations and was not invoked thereafter. Thus, the Government and the Charging Party emphasize, the Respondent never challenged Dominguez' February 11, 1997 letter to Bush denying any agreement applied to the information requests at issue and, they note further, the Respondent thereafter supplied the information.

Based upon all the above and the record as a whole, it is clear and I find that the agreement had application to the Union's legal department requests for information and no effect on union representative requests for information at the store level. I further find, resolving the dispute in favor of the General Counsel and the Charging Party, that there was no clear agreement on restricting information requests made by union representatives investigating grievances directed to the Respondent's Boise labor relations department. For such important rights to be limited or waived by the Charging Party, a specific agreement applicable to the specific information request as issue needs to have been entered into. I find that no such agreement was reached and that the sole agreement that was reached did not apply to the information request herein. Even if Yost believed that the union business representative information requests involved herein were limited by his oral agreement with the Union and conveyed that view to Bush—a finding I do not make the fact that there was no such applicable agreement which rose to the level of a clear and unambiguous limitation of the Union's rights to request the specific information in the manner and from the legal department as it did here prevents such a belief from acting as a viable defense to the withholding of the information.⁴³ Accordingly I find the General Counsel's complaint allegations in paragraph 67 are sustained.

(15) Complaint paragraph 68

Complaint paragraph 68 alleges:

- (a) On various dates including on January 27, 1997, orally and on February 6, 1997, in writing, UFCW 7 requested that Respondent provide the "Payroll Store Employer's Special Hours Roster" for the following "bargaining unit areas":
- (i) All Albertson's Denver Metro retail and meat departments;
- (ii) All Max Foods Denver Metro retail and meat departments;
- (iii) All Albertson's Boulder retail and meat departments:
- (iv) All Albertson's Longmont retail and meat departments;
- (v) All Albertson's Colorado Springs, retail and meat departments:
- (vi) All Albertson's Grand Junction retail and meat departments;
- (vii) All Grocery Warehouse Grand Junction, retail and meat departments.
- (b) The information requested by UFCW 7, as described above in paragraph 68(a) is necessary for, and relevant to, UFCW 7's performance of its duties as the exclusive collective-bargaining representative of the Denver Grocery Unit, Front Range Meat Unit, UFCW Max Foods Clerks Unit, UFCW Max Foods Meat Unit, Grand Junction Clerks Unit, Grand Junction Meat Unit, and Grand Junction Max Foods Clerks Unit, described above respectively in paragraphs 6–13, and is a mandatory subject for the purposes of collective bargaining.
- (c) Since about January 27, 1997, and for an unreasonable time thereafter, Respondent through its agents including Kathryn Bush has delayed, failed and refused to furnish UFCW 7 with the information requested as described above in paragraph 68(a).

Local 7 represents several large units of the Respondent's stores in Colorado. In 1996 the relevant collective-bargaining agreements respecting these employees contained provisions for two employee personal holidays. The Union came to believe that some employees were either not being given the contractual holidays or were not being allowed to take them. In consequence, in October 1996, Union Representative Dominguez asked a store manager and a warehouse director for copies of the Respondent's "Payroll Store Employer's Special Hours Roster" which he had requested and received previously. He was informed that Bush had instructed that the forms not be given to the Union.

The Respondents special hours roster is a form generated by Boise payroll and supplied to each store. Each store specific form lists all store employees along with each employees hire date, birth date, vacation availability, sick hours earned, personal holidays, job classification, and step. The forms also

discredit Yost and credit Hakes, finding that the oral agreement and the confirming communication note did not expressly deal with information requests such at the ones involved herein.

⁴³ The record contains no basis for believing that the Charging Party was responsible for Yost's misperceptions, if any, respecting the applicability of the agreement. And, as the Union argues, the requests for information were made originally at the store level and the store level management referred the Union to Boise for the information sought. Were it necessary to do so to resolve this issue, I would specifically

contain social security numbers and income tax information such as taxpayer identification numbers, number of claimed withholding exemptions, and filing status.

On January 27, 1997, during the course of a telephone call initially covering other matters, Dominguez asked Bush to obtain copies of the special hours rosters and indicated he would file a grievance if he could not obtain them. Dominguez testified he told Bush that he had obtained the reports in the past and that he needed the information contained on them to police the contract Dominguez testified he told Bush:

[T]hat we needed special hours rosters and used it for things like recording demotions that they had made, recording transfers that they had made to other stores, recording promotions, recording terminations, gathering names of new hires that had been hired on. And the information we needed on there was to make sure also per the contract as to whether they were getting paid their wages properly which was—which is part of the personal holiday thing.... I emphasized the personal holidays that we needed to get copies and find the names of the people who were not getting their personal holidays.

Bush recalled that:

Dominguez told me that he wanted the copies of the special hours roster to monitor movement of employees between one job classification to another, to see at the end of, on the report if employees had unused vacation and if so how much, unused personal holidays, if so how many.

She testified she told him:

I explained to him that we had some concerns over providing the report for the reason that it contained information for nonbargaining unit members and that it had other information that we considered to be confidential.

Dominguez recalled that Bush told him there was too much confidential information of the forms and referred to social security numbers as an example. The two differed on the confidentiality of social security numbers with Dominguez pointing out that the Union always had access to the social security numbers of its members and Bush responding that they did not get that information from the Respondent. Neither mentioned redaction or other compromises respecting disclosure of the forms.

On February 6, 1997, Dominguez wrote Bush a letter informing her that as discussed in their January 27, 1997 phone call, he was filing and enclosed a step-I class action grievance for denying the Union the right to copy the special hours rooster for stores in the represented Colorado units and threatened to file an NLRB charge on the issue. The Union filed the relevant charge respecting the matter on February 10, 1997.

Yost testified that probably in January or February 1997, he exchanged voice mail messages with Union Retail Director John Mathewson:

[Mathewson] left me a voice mail asking why we were not willing to provide copies of the special hours roster, and I returned his call and got his voice mail. Then, I left him a voice mail saying that I believed that it contained certain personal information, but that I was more than willing to provide him

with information concerning the personal holiday status of any employee or group of employees in the division.

Bush recalled being present when Yost left the telephone voice mail message for Mathewson. She dated the call as following the Respondent's receipt of the charge filed on February 10, 1997. She testified:

I was in his office, he called and left a message for John Mathewson on his voice mail that, explaining the situation that the roster contained information, we had some concerns about confidentiality, but that we were more than willing to make sure that they had access to the routine information that they needed to process their paperwork and keep track of employees moving from one job classification to another, and that we were willing to work out some solutions for them to get the information that they needed.

Yost testified that Mathewson did not return the telephone call. The Union filed additional grievances on February 21, 1997. On March 11, 1997, Bush wrote Dominguez a letter stating:

I am writing in follow-up to the grievances you filed regarding the Payroll Store Employee Special Hours Roster.

The current labor agreement does not contain any provision which requires the employer to produce this roster, As we discussed before, routine information concerning an employee's job class, pay rate, available vacation and experience hours has always been available at store level. Please contact the Store Director and arrange a mutually agreeable time to obtain the information.

Yost met with Hakes in mid-March regarding the grievances. Yost testified regarding the meeting. He recalled that Hakes said he had been able to obtain the rooster in his earlier days servicing the Respondent's stores. Yost stated he did not wish to provide the personal information to the Union, but the other information could be provided. They agreed that Yost would provide December 1996 redacted copies and thereafter union representatives could monthly inspect rosters at the stores but would not be allowed to take copies with them.

On March 18, 1997, the Union wrote the Regional Director attempting to withdraw the unfair labor practice charge. Bush sent the Union the redacted copies of the forms on April 10, 1997. The Regional Director did not approve the withdrawal of the charge.

At the threshold, the Respondent seeks that I approve the withdrawal request of the Union, find the charge has been withdrawn, and dismiss the complaint allegations based on the withdrawn charge. As found with other withdrawal requests respecting the charges herein that the Regional Directors declined to approve, I find it is not appropriate to approve the withdrawal request and I decline to do so. The General Counsel has pled and proved numerous unfair labor practices herein involving the Respondent and Local 7 respecting information requests. Such a history precludes in my view a rejection of the General Counsel's opposition to the approval of the settlement as discussed, supra.

The General Counsel and the Charging Party correctly argue that the information on the rosters that the Union was specifically seeking, as described above, was relevant to the policing of the contract. They point out that the requests were repeated, clear and that the Union had up to this time regularly been given access to the rosters. No issues were raised about difficulty of producing the documents.

The Respondent notes that the rosters contained irrelevant information that the Union was not entitled to and that the Respondent clearly and repeatedly communicated that fact to the Union during the course of the dispute. It notes that the complaint allegations themselves refer not to the argued relevant facts contained in the roster that the Union argues justify its disclosure, but the entire form which clearly contained matters properly sheltered by the Respondent.

The Respondent also argues that the record indicates that the Respondent was at all times willing to negotiate with the Union regarding the information the Union claimed it needed and communicated that fact to the Union. And, when Hakes and Yost on March 19, 1997, concluded the negotiations respecting how the information was to be disclosed and in what form, the Respondent provided the agreed upon information on April 10, 1997, and the Union was satisfied. Finally, the Respondent emphasizes that it at no time denied the Union access to alternative sources of that information.

The General Counsel and the Charging Party argue that the Respondent never budged from its simple refusal to provide the roster in any form until the Yost-Hakes meeting in March 1997, well after the Union had been required to seek the rosters at store level, from Boise, file grievances on the issue and file a charge with the Board. All this, they argue respecting a form the Union had regularly had access to up to that time and which contained important and not otherwise easily obtainable information. They note the forms were easily redacted by the Respondent to delete the allegedly confidential information the Respondent was now for the first time so protective regarding.

Finally, the General Counsel and the Charging Party note that the Respondent's glib protestations that the information the Union sought was always available at the store level from other documents ignores the multiple documents that would be necessary to obtain the same information the rosters would easily provide. They note that the record is quite clear respecting the numerous petty impediments and obstacles the Respondent regularly put in place for the inspection and photocopying of documents at the store level. They urge a finding that the Union need not—and the Respondent was unreasonable to insist on—go to the individual stores to inspect large numbers of documents in large bargaining units when there was a centralized form that contained the necessary information available and which had been specifically requested by the Union.

I agree with the General Counsel and the Charging Party that the information contained on the roster that the Union specifically sought was relevant to the representation of the units at issue. I further find that the information contained on the roster efficiently records the information sought as compared and contrasted to the alternatives proposed by the Respondent to the Union. I find that the Union was entitled to insist as a matter of right on obtaining the information on the requested the roster in a single report. I agree with the Respondent, however, that the roster also contained information, such as the inclusion of in-

formation respecting nonunit employees and the tax information respecting unit employees, to which the Union was not entitled and respecting which the Respondent was entitled to withhold.

These two findings produce different results depending on circumstances. If the Union had asked for the rosters and specifically said they did not want the information the Respondent regarded as confidential and it could be redacted, the Union was without question entitled to the redacted documents under Section 8(a)(5) of the Act. If the Union had insisted on access to unredacted copies of the rosters, there is no question that the Respondent would be entitled to refuse to provide access to unredacted rosters without falling afoul of the statute. Neither of these different circumstances took place, however.

In the actual events, the Union sought the rosters and the Respondent refused to provide them. While the requests and refusals, described above, were multiple and included the Respondent's allusions to confidential contents and some discussion of those contents, the record is devoid of any evidence that the Respondent offered the rosters to the Union in redacted form or the Union expressed interest in, let alone specifically requested, rosters with the information the Respondent wished to withhold redacted by one means or another. It is also clear the arguments of the Respondent to the contrary not with standing-that the Respondent at no time offered to bargain with the Union respecting the forms. There was some reference to the provision of alternative sources of information, but that is not at all the statutory equivalent on this record—as the General Counsel and the Charging Party argue—of provision of the rosters themselves.

Not until the March meeting of Hakes and Yost—well after the charge was filed—was redaction discussed and used as the vehicle for resolving the dispute between the parties. The redacted forms were finally provided in April some 3 months after the initial written requests.

The final provision of redacted rosters clearly involves an unreasonable delay in providing them by the Respondent in violation of Section 8(a)(5) of the Act, if the requests for the rosters—without reference to redactions—made by the Union as alleged in the complaint in January and February count as requests which triggered an obligation to disclose the redacted rosters. If those requests did not place an obligation on the Respondent to either provide the unredacted forms, offer the redacted forms or offer to bargain respecting the redaction of the forms, then the Respondent was under no obligation to disclose and the complaint paragraph fails.

I find the Union's request for access to the rosters in January and February triggered a duty on the part of the Respondent to provide the forms or to make specific offers to limit the disclosure of the roster contents by redaction or other appropriate means. I place this specific burden of the Respondent for two reasons. First, on this record it is clear that the roster had historically been disclosed to the Union and was of value to it to police the contract including the unusual contractual provisions regarding employee personal holidays. All assertions respecting the need to protect the forms from disclosure made by the Respondent flew in the face of that undisputed past practice. In this regard it is also relevant that the alternative means of ob-

taining the necessary information, i.e., store by store from numerous other documents was clearly burdensome as compared and contrasted to the provision of the headquarters generated rosters. The Respondent was changing the practices and protocols of the parties respecting the rosters and this placed a special burden on the Respondent to be more forthcoming with the Union that the limited explanations regarding vague references to confidentiality and the inflexible refusal to disclose the rosters that took place.

Second, I find the Respondent, when faced with a request for disclosure of a form that contained what it believed was confidential and irrelevant information in addition to the relevant information the Union advanced as the basis for seeking disclosure, was obligated as a matter of law to either disclose the forms or propose alternatives respecting the forms which would meet its concerns. This is simply part and parcel of the obligation of an employer to seek accommodation when opposing particular disclosure. See, e.g., *Island Creek Coal Co.*, 289 NLRB 851 fn. 1 (1988). The Respondent's blithe assertions that the Union could obtain the information from alternative sources at the store level was not—on this record as found, supra—a reasonable accommodation.

Accordingly, based on the case law, the record as a whole and independently on the unusual facts of the matter including the parties' history respecting this form and the provision of information at store level as discussed elsewhere in this decision, I find that by refusing to supply the requested rosters to the Union without offering a reasonable accommodation to the Union's need for the information contained on the rosters for the period from the January and February 1997, requests until April 1997, the Respondent violated Section 8(a)(5) and (1) of the Act. The allegations of complaint paragraph 68 are sustained.

(16) Complaint paragraph 69:

Complaint paragraph 69 alleges:

- (a) On or about February 18, 1997, UFCW 7, in writing, requested that Respondent furnish UFCW 7 with the following information concerning the remedy hearing for grievance No. 258-93 relating to Respondent's Store # 860:
- (i) The personnel files, "the store files, corporate personnel files, workers' compensation files, security files and any documents contained therein" of the grievant "including but not limited to work or performance evaluations, disciplinary actions, medical records and/or restrictions, commendations, progress reports, documentation of counseling, documentation of verbal warnings, documents contained therein which were relied upon by the Company in making and/or in justification of the grievance decision it made, and all other documentation contained therein except for routine personnel actions."
 - (ii) (subparagraph withdrawn)
 - (iii) (subparagraph withdrawn)
- (b) The information requested by UFCW 7, as described above in paragraph 69(a) is necessary for, and relevant to, UFCW 7's performance of its duties as the exclusive collective-bargaining representative of the Denver

Grocery Unit, Front Range Meat Unit, UFCW 7 Max Foods Clerks Unit, and UFCW 7 Max Foods Meat Unit described above respectively in paragraphs 6–9 and is a mandatory subject for the purposes of collective bargaining.

(c) Since about February 18, 1997, and for an unreasonable time thereafter Respondent through its agents including Christopher Campbell has delayed, failed and refused to furnish UFCW 7 with the information requested by it as described above in paragraphs 69(a)(i)–(iii).

Local 7 filed a grievance on behalf of represented Respondent store #860 employee Amos Varos in 1993. The matter went to arbitration. A second arbitration was pending respecting the remedy for Varos when the Union through council Bowen, on February 18, 1997, made the written request for information set forth in the complaint subparagraphs 69(a)(i) to Christopher Campbell, a labor relations representative of the Respondent in Boise, asking that the information be provided at the Respondent's earliest convenience but no later than April 21, 1997. Campbell responded by letter of March 5, 1967, which referred to the noted information request as follows:

As to your information request . . . because this information is confidential to the employee, please provide Albertson's with Mr. Varos' signed and notarized approval for Albertson's to send you this information.

The Union filed the instant charge on March 11, 1997. On March 20, 1997, the Respondent provided the information. On March 21, 1997, Local 7 moved the Regional Director to withdraw the charge. The Regional Director did not approve the request.

The Respondent moved dismissal of complaint subparagraph 69(a)(i) and I denied that motion by written order dated November 16, 1999. One of the Respondent's arguments for dismissal was that the complaint alleges an unreasonable failure to provide the information when the General Counsel's theory of a violation was conceded to be an imposition by the Respondent of a wrongful condition on the disclosure. I declined to dismiss the complaint on that grounds in my order. The Respondent, pointing out that the General Counsel despite amending the complaint on numerous occasions thereafter, never moved to correct this mispleading, renews its motion to dismiss on this alleged variation between the pleadings and the proof.

I found then and, reevaluating the issue based on the entire record, I reiterate my earlier finding that the variance is not fatal to the allegation. I find that the Respondent was on notice of the theory of the General Counsel at all relevant times and certainly after the argument and ruling on its motion in November 1999. There is no issue that the Respondent did not understand the theory of the government nor have full opportunity to consummate its defense.

Second, I find that the language of the complaint sounding in unreasonable delay is not quite so inartful as may appear at first impression considering the facts adduced. As is discussed below and is not in factual dispute, the Respondent agreed to provide the information, if it obtained a notarized employee's permission. The Respondent may fairly be found based on this representation to have delayed providing the information be-

cause it did not have the employee's signature. Since the condition was unreasonable in the Government's theory of the violation, the Respondent's delay in providing the information was unreasonable. Viewing the language of the complaint with these facts in mind, I do not find that the complaint is necessarily at all at variance with the facts elicited. I shall therefore not dismiss this allegation of the complaint on the grounds presented.

The Respondent also argues that the Union's withdrawal request should be approved by me, the charge withdrawn and the complaint allegation dismissed. As discussed supra, with respect to complaint paragraph 69 I decline to approve the withdrawal request over the General Counsel's opposition where there have been multiple information provision violations by the Respondent in its dealings with Local 7 found herein.

Turning then to the merits of the allegation, there is no doubt the information request at issue was proper. The General Counsel and the Charging Party argue the uncontested proposition that the Respondent's insistence that the union first proffer a notarized permission slip was not proper. The Respondent argues, in effect, "so what," since, in all events, the information was in fact provided to the Union on March 20, 1997, a month earlier than the Union's request required.

The Respondent's actual time of disclosure was in fact within the Union's requested disclosure time period. The disclosure was not unreasonable considering these two facts in isolation. The interim imposition of a wrongful conditionhere the requirement of a notarized permission—is legally analogous in this case to an affirmative refusal to provide the information. Where a union asks for information to be delivered within a certain amount of time, an employer may not early within that period communicate a refusal to supply the information and then just before the original time period runs, supply the information and claim nothing untoward occurred. The refusal in that case and the wrongful condition here resets the clock as it were. The Union here was preparing for an arbitration. Having had its request for information refused, it must take practical steps to obtain the information, if possible, or make other provisions to prepare its case for presentation without the requested information. If the opposing party could with impunity refuse to provide or wrongfully condition the provision of information to a union and thereafter provide it at the last minute, the entire process of information provision as an aide to the orderly investigation and litigation of disputes would be disrupted. I find therefore the fact that the information was ultimately supplied within the original window of time provided by the Union is not dispositive of the matter.

Finally the Respondent argues that the notarized permission slip precondition of its agent Christopher Campbell was an error, but one based on that individuals simple ignorance of the practices and protocols of the Respondent in its dealings with the Union as well as the requirements of the Act. The action, argues the Respondent, came as a beginner's mistake by an individual brought in simply to assist in a particular situation and occurred without the knowledge of or approval of any other individual in the Boise office. Further, the Respondent emphasizes, Yost upon learning of the action immediately caused the information to be disclosed and made it clear to the Union that

the action was a simple mistake and no more than that. The Respondent urges that the entire sequence of events regarding this allegation when viewed fairly clearly demonstrates that the matter was an aberration arising from a error by an ignorant substitute worker of the Respondent and was first immediately corrected and second in its totality did not delay the provision of the information beyond the period when the Union sought its disclosure.

The Government seeks to challenge the innocence of the error pointing out that Campbell, an attorney at law, had been employed by the Respondent for almost a year and that the action was but another in a myriad of techniques and devices in which the Respondent undermined the Union by manipulating the information provision process.

Considering the entire event in light of the record as a whole, I do not agree with the General Counsel that there is any evidence connecting Campbell's wrongful requirement for an employee permission slip with any other agent of the Respondent, particularly Yost and Bush. I accept the argument of the Respondent that the record shows the incident to be a sport, out of pattern. I also agree that the Respondent, though Yost, recanted of its error and disavowed any suggestion that the condition was new policy or justified in any manner.

The imposition of the wrongful condition was a violation of the Act. Elsewhere in this decision, I have upheld held the government's position that there is a pattern and practice of unreasonable actions respecting information requests by the Respondent. I have found herein a significant number of violations of the Act respecting the Respondent's handling the Unions' information requests and I have sustained the General Counsel's opposition to approval of the Unions' charge withdrawal requests. This broad context of improper conduct in my view prevents my finding this particular information request violation of the Act was either de minimus or was remedied by the subsequent conduct of the Respondent. Therefore I sustain the complaint allegation.

But as a practical matter, the Respondent has prevailed in convincing me that the Campbell's actions were but error, retracted upon discovery by his more knowledgeable colleagues. Thus, the effect of the events in supporting the Government's general allegations of pattern and practice villainy is essentially nil. And, given the breadth the remedy directed respecting Local 7 as well as the entire case, infra, the violation does not add to the remedy herein.

(17) Complaint paragraph 75

Complaint paragraph 75 alleges:

- (a) On about January 29, 1998, UFCW 7 orally requested that Respondent provide records which showed the number of hours the "head clerks" had checked during the period December 12, 1997, to that date relating to a grievance concerning "all-purpose clerks" being assigned fewer hours because such hours were being assigned to "head clerks"
- (b) On about February 4, 1998, UFCW 7 in writing requested Respondent to provide "copies of the daily operations cash reports for December 12, 1997, and ongoing" and copies of security tapes.

- (c) On March 11, 1998, UFCW 7, in writing requested that Respondent provide "The check stand summary sheets that show business by checker number," a complete list of "number assignments," information which shows, by checker number, the time worked by an employee in the check stand, any other "pertinent information" and copies of security films showing the weekly "front end" operation
- (d) The information requested by UFCW 7 as described above in paragraphs 75(a)–(c), is necessary for, and relevant to UFCW 7's performance of its duties as the exclusive collective-bargaining representative of the UFCW 7 Max Foods Clerks Unit described above in paragraph 8 and is a mandatory subject for the purposes of collective bargaining.
- (e) Since about January 29, 1998, and for an unreasonable time thereafter Respondent through its agents including Kathryn Bush, Steve Marzolf and Jolene Zajdel has delayed, failed and refused to recognize and bargain with UFCW 7 as the exclusive collective-bargaining representative of the UFCW 7 Max Foods Clerks Unit described above in paragraph 8 and refused to provide UFCW 7 with the information which it had requested as described above in paragraphs 75(a)–(c).

(a) Facts

Local 7 represents employees in the Grand Junction, Colorado area including employees in store #1867. Local 7 Business Representative Rob Elliott received reports in December 1997, from store #1867's shop steward that she suspected non-bargaining unit employees, key people or head clerks, were working excessively in the unit position of checker depriving unit employees of work to which they were entitled under the agreement.

On December 12, 1997, Elliott discussed the matter with Store Manager Les Wassom. The two differed in their views, Elliott taking the position that excessive use of head clerks as checkers in the check stands improperly reduced the hours that all-purpose clerks were entitled to under the agreement. Wassom indicated that the Respondent could use head clerks in the check stands and in the frozen food department without limit.

Elliott requested information to determine the extent of head clerk time in the check stands. Elliott recalled he asked for a report that had heard of that would show the times an individual had worked in a given check stand. He also testified that he asked for security tapes showing check stands. Wasson testified that he was not asked for security tapes until receiving the letter of February 4, 1999, discussed infra. Wassom testified that after inquiry of a colleague respecting the computer system in use at the store, he told Elliott he did not know of a report of the type Elliot had asked for and referred Elliott to Boise for more information on such a report.

Elliott filed a grievance on December 17, 1997, on behalf of store #1867 all-purpose clerk, Tina Trujillo, alleging that her hours and work had been wrongfully reduced in consequence of the work being done by head clerks. Elliott and Bush discussed the grievance by telephone on December 22, 1997, and January 29, 1998. Bush took the position that the Respondent was enti-

tled to use head clerks without restriction, that a similar grievance was pending, and that the Respondent would adhere to its position short of arbitration. Elliott asked for copies of the security videotapes that showed the check stands and for a report showing log on and log off times at the check stands. Bush responded that she was unaware of such a report, but would check on it and on the videotapes.

On February 3, 1998, by letter to Elliott, Bush confirmed the Respondent's position that the scheduling of head clerks was without contractual limit and therefore the Trujillo grievance was without merit and should be withdrawn.

Elliott by identical letters dated February 4, 1998, to Bush and Wassom, requested copies of "daily operations cash reports for December 12, 1997, and thereafter" and copies of security tapes that "show Head Clerks (Key People) checking excessively." Wassom testified that he had conversations with Elliot in person and with Bush by telephone at around this time. He told Elliott that he would have to get permission from Boise to give him the tapes. He recalled that Bush asked him about the existence of security tapes showing the employees checking and that he told her he had none. In fact part of the security system did record a check stand and a part of another. Wassom also testified that when he learned that Bush had gotten the same letter he had and was handling the matter, he did not provide the daily operator reports requested in the letter.

Bush responded to Elliott's February 4, 1998 letter, by letter of February 10, 1998, in which she asserted: "Although we do not believe there is any contractual basis for this grievance, please explain the relevance of the information you have requested."

On February 26, 1998, Elliott met with Wassom respecting a second parallel grievance and renewed his request for information. Wassom told Elliott that Boise was handling the grievance. Elliott testified he returned to the subject of the information request and the tapes that showed the checking stands. He told Wassom:

I wanted to make sure that those tapes were not destroyed and I told him that, "Don't destroy the tapes. Don't—If you can get this information on these—the reports that I am asking for, I don't want that destroyed. We want them. We will get them at some point."

On March 9, 1998, Elliott and Bush discussed the grievance by telephone and Local 7's need for the videotape. Bush asked for a written recitation of the Union's theory of the grievance. Bush testified that she told Elliott that the daily operator cash report did not contain logon and logoff times. Elliott insisted that there was a store generated report of some kind that would provide the information. Bush told him she did not have any information that his assertion was true.

Bush testified that she and colleague Yost had obtained operator cash reports and, after noting that they did not contain logon and logoff information and after the phone call with Elliott on March 9, she determined the information was not wanted by the Union and sent the material back to records.

On March 11, 1998, Elliott sent Bush a letter setting forth the Unions contractual arguments. It also asserted:

Again, I reiterate my request for information. The Union needs the following:

Copies of security films that the company currently maintains of the front end. The Union will supply blank tapes.

The checkstand summary sheets that show business by checker number. Also a complete list of number assignments

I have been told that the time logged on is also available (by checker number). If this is the case then this information also, as well as any other pertinent information.

On March 26, 1998, the Respondent's contract administrator, Jolene Zajdel, sent Elliott a letter respecting the February 26, 1998 grievance, The letter denied the grievance and asked:

So that the record is clear, please provide a detailed explanation of how you believe the labor agreement limits the Company's ability to assign Key Persons to perform checking or other Front End duties. Please provide with your explanation all documents, including not limited to negotiation history, correspondence and any further information, which supports your proposition.

Elliott spoke by telephone with Bush and Zajdel on April 7, 1999, concerning the December 26, 1998 grievance. Elliott told the two the second grievance was basically identical to the first. Bush requested a written explanation. Elliott protested since he had no secretary and was located away from the Union's offices. He proposed the Respondent duplicate the original union letter, but Bush declined this offer. Elliott asked about the report he had requested and Bush told him there was no document that would give him the information he desired.

Steve Marzolf, the Respondent's then new contract administrator, testified that he was instructed by his superiors to determine if the daily operator cash reports contained checker logon/logoff times. He talked to the store director about them and in time obtained them from central record keeping. They were gathered and available for shipment to the Union. It was determined that they did not bear the logon logoff dates.

On April 7, Bush and Elliott with Marzolf present for a time, held a step-II telephonic meeting respecting the second grievance. Once again the requested the records were discussed. Bush testified she told Elliott that the security tapes showed the customer service booth not the check stands. Elliott responded that in the background three check stands could be observed. Bush, corroborated by Marzolf, told Elliott that the daily operator cash reports did not contain logon/logoff times. Elliott noted that there was a store-generated report on tapes.

Bush testified that after this call, Marzolf was instructed to determine if the equivalent of cash register tapes were available and she checked with the store and confirmed that the security tape did in fact have check stands in the background. Bush testified she called Elliott back, told him he was correct regarding the tapes and told him, "if he wanted to provide blank video tapes to the store director we would arrange for them to be duplicated at the Union's expense." Marzolf determined that the information equivalent of a cash register tape could be obtained at substantial expense.

On April 10, 1998, Marzolf wrote Elliott in response to Elliott's March 11, 1998 information request. The letter purported to confirm an agreement that the Union would provide blank tapes and pay for the costs incurred in having the tapes duplicated. It further noted at transaction logs or check stand summary sheets were susceptible of generation by IBM, but would be lengthy and expensive—likely exceeding \$1000—the costs to be born by the Union if the report was desired.

On May 5, 1998, Bush and Elliott spoke by phone and Elliott told Bush, in her recollection, that the procedures suggested by Marzolf in his April 10 letter were unacceptable and that the Union would pursue the information through an unfair labor practice charge. He remained convinced that a store generated report would contain the information he had requested. Bush disagreed. She confirmed the conversation in a letter to Elliott later that same day.

On May 13, 1998, Bush wrote Elliott a letter respecting the Trujillo grievance with the following text:

I am writing in follow-up to the grievances listed above.

Please provide me with any and all documents, notes and negotiating history that support your contention that the "incidental" work language in the current contract prohibits keypersons from checking. Also, please advise me of the date you began serving as a business agent with Local 7, and when you were assigned responsibility for Albertson's #886 and Max Foods #1876. Further, please estimate the amount of time you have spent in each of those stores since you became the business representative covering those stores. Finally, please list and provide copies of all grievances you of Local 7 have filed since that time objecting to keypersons performing checking duties. I look forward to receiving your response to this request for information.

The Union filed the charge on May 18, 1998. The grievances were resolved on December 1, 1998.

(b) Analysis and conclusions

The Respondent at trial moved for summary judgment on this paragraph of the complaint which motion was denied by Order dated November 16, 1999. The argument made at that time, and renewed on posthearing brief, is that the Respondent has conceded that the key people at store #1867 were doing more than incidental unit work and asserted an unfettered right to assign such staff to checking duties without limit. Thus, the Respondent argues the precise amount of the work actually done by key people was irrelevant to the grievance and therefore the information requested was also irrelevant.

I rejected the argument of the Respondent above in my order and will not repeat that analysis here save to note that the Respondent never offered to stipulate or concede that the key personnel were undertaking a specific percentage or proportion of the checking work or even stipulate as to some number of hours per day or week done by such employees. A second, independent, basis for rejecting the Respondents renewed argument merits mention. The Union in evaluating a grievance, beyond a raw calculation of merit, requires information respect-

ing the impact of the grieved actions on the bargaining unit both for purposes of determining whether or not to proceed with the grievance at various stages through arbitration and for determining the appropriate settlement postures to take at relevant times. Thus, for Local 7 here, the extent or degree of the Respondent's assignment of nonunit key persons to checking duties and the impact of those assignments on the number of unit employees employed and their total hours of employment is highly relevant to informing the Union's evaluation of the importance of the grievance in terms of the harm done to the unit as well as to guiding what positions the Union might take in any future settlement of the grievance.

Based on all of the above and my Order of November 16, 1999, I find the information respecting the extent of key person checking sought by the Union was relevant to the grievance and to the Union's representation of unit employees.

The General Counsel and the Charging Party Local 7 argue that the Respondent's repeated delays in the offer of the requested information and the Respondent's requirements that the Union explain in writing, not once but twice, what it was after in its information requests, was simply a charade to delay and obstruct the Union. They argue that the Respondent did not believe the Union needed any information beyond the Respondent's admission that head clerks did checking. The delay, spanning the period from the January, February, and March 1998 requests to the April 1998 offers of tapes and computer generated checking information violated the Act.

The General Counsel emphasizes that the Respondent over time gathered the daily operator cash reports or daily operators report and had them packed for transmission to Local 7 only thereafter to decide that they did not contain the information the Union needed. Counsel for the General Counsel points to the quibbling and questioning of the Respondent of Elliott's information requests both in writing and in phone calls as evidence of bad faith.

The Charging Party characterizes the Respondents conduct in dealing with Elliott's information requests as a "guess the proper document" game in which the Respondent was being deliberately unhelpful if not devious. Counsel for the Charging Party also notes that despite Elliott's early notice to the Respondent that the security tapes were going to be relevant and should not be destroyed, the tapes were in fact over recorded over and thus rendered unusable by the Respondent.

The Respondent emphasizes that the information request was never clear even after discussion with Elliott. Despite the lack of clarity, the Respondent endeavored⁴⁴ to understand and thereafter supply what was being requested. The information enabling the Union to identify a particular employee with a checker number with not withheld. The Respondent argues it had no obligation to provide what, in so far as its search revealed, did not exist, i.e., the mysterious store generated document showing login and logout times for checkers, While there was certainly some confusion respecting what was desired and

further confusion and misunderstanding respecting what was on the security tapes, the Respondent acted expeditiously and reasonably throughout. Further, it offered to provide both the tapes and the voluminous item by item readouts, conditioned only on resolution of cost issues, which issues the Union did not pursue.

The General Counsel and the Charging Party emphasize the letters of Bush in effect interrogating Elliott and, they argue, the insulting and demeaning approach of the letter of May 13. These actions in my view are not determinative of the issues raised by the complaint allegations for they do not support in the overall context of these specific events a finding of bad faith. Rather, I find the analysis must focus on what was specifically requested by the Union and what the Respondent's response was under all the circumstances: Was the Respondent's response reasonable or unreasonable as those terms are used in information cases?

I find that there is insufficient evidence to sustain the General Counsel's complaint paragraph respecting the items sought by the Union. First, I find there has been no showing of the existence of the nebulous store generated report with checker logon/logoff times, let alone that the Respondent's agents knew of it and denied it to the Union. Similarly, I find that the Respondent's agents did in fact endeavor to identify just what it was that Elliot was seeking. In this connection, contrary to the arguments of the General Counsel and the Charging Party, I find it was not unreasonable to have returned the operator's reports to corporate records without providing them to the Union after it seemed that Elliott acquiesced in the fact that those records did not contain the logon/logoff information he was seeking.

Respecting the security tapes, I do not find on the entire record, that the Respondent either misrepresented the contents to the Union or delayed their production so that they would be over recorded. Crediting the Respondent's agents, I find rather that confusion and misunderstanding explained the delay in providing access to the tapes. Finally, I do not find the conditioning of provision of the transaction information or the tapes on a cost contribution by them was unreasonable.

Accordingly, based on all the above, I find the Respondent did not violate the Act as alleged in complaint paragraph 75 and it shall be dismissed.

- 3. Teamsters Local 537—Complaint paragraph 65 Complaint paragraph 65 alleges:
 - (a) Since about the dates listed below, Teamsters Local 537 orally and/or in writing requested that Respondent furnish Teamsters Local 537 with the following information relating to grievances set forth below at Respondent's Denver Distribution Center:
 - (i) October 4, 1995, (Dale Pacheco grievance)—copies of any documents or any medical records upon which the company has based its decision to deny Mr. Pacheco his former position; April 2, 1996—the number of hours Mr. Pacheco has been working in the various job duties he has been assigned, for each workday since he returned to work from his injury; June 13, 1996, copies of all company records that show the job assignments of the day shift perishable department employees and the hours of

⁴⁴ I find, resolving the dispute as to whether or not Elliott asked Wassom for security tapes in their initial December 12 conversation by crediting Wasson over Elliott, that Elliott did not ask for them at that time. He did ask Bush for them on December 17 however.

each employee worked by job category, i.e., frozen forklift operator, frozen order selector, ice cream selectors, frozen loader, meat lift, meat deli lift, meat deli receivers, produce lifts, produce checkers, et. cetera, for each workday during the period from February 1st, through May 31st, 1996. These documents should include at a minimum the daily perishable day shift work schedules, the weekly T-Put production planners, productivity records for the Article 37 production standards, productivity records for employees other than order selectors, and any reports used by the company to calculate hours out of selection. Please include any summaries, data compilations, or other records that contain any of this information;

- (ii) December 4, 1995, (December 4, 1995, Robert Grauberger grievance)—copies of the bids and dispatch records for all drivers who bid hourly or mileage milk runs for the work week ending November 25, 1995:
- (iii) February 12, 1996, (Martin Tara grievance)—all documents, witness statements and/or supervisor reports upon which Respondent relied to discipline the grievant;
- (iv) February 28, 1996, (February 22, 1996, Robert Grauberger grievance)—copies of the Respondent's policy regarding store delays and any other written warnings to any other drivers for a similar alleged offense for the period of January 1, 1996, to the present;
- (v) March 4, 1996, and April 4, 1996, (McCovy/Rosenwald grievances)—"copies of any and all company records that show the job assignments of the swing shift employees for both the Grocery Department and the Perishable Department, and the hours such employees work by job category." for April, June, and November 1995;
- (vi) March 5, 1996, (Dean Harrison grievance)—copies of any documents or any criteria upon which Respondent based its decision to refuse to allow the grievant to bid on and hold a forklift position;
- (vii) March 7, 1996, and March 29, 1996, (Harold Scheck grievance)—copies of the payroll records and work week schedules for the week ending February 24, 1996, for all day shift employees;
- (viii) March 8, 1996, and April 17, 1996, (March 6, 1996, Ralph Beaver grievance)—copies of all witness statements, supervisor reports and any other documents or criteria upon which Respondent based its belief that it had cause to discipline Ralph Beaver;
- (ix) March 19, 1996, and April 17, 1996, (Mike Cummins grievance)—all documents or any other criteria upon which Respondent based its decision to discipline the grievant;
- (x) March 29, 1996, and April 17, 1996, (March 25, 1996, warehouse employees swing shift grievance)—a description and documentation showing all relevant business factors which Respondent believes substantiates its position to arbitrarily assign any employee to any specific shift it chooses;
- (xi) April 3, 1996, and April 25, 1996, (Ralph Beaver's April 1, 1996, grievance)—copies of the relevant business factors or any other criteria, relied upon by Respondent in making its decision to assign a less senior em-

ployee to the forklift position which the grievant had held for several years;

- (xii) April 5, 1996, (Tony Fleming grievance)—the relevant business factors or other criteria upon which Respondent relied in making its decision to assign an employee other than the grievant to the position that the grievant held prior to being injured;
- (xiii) April 10, 1996, (Pete Therkildsen grievance) any and all documents or other criteria relied upon by Respondent in making its decision to terminate the grievant;
- (b) The information requested by Teamsters Local 537, as described above in paragraphs 65(a)(i)–(xiii) is necessary for, and relevant to, Teamsters Local 537's performance of its duties as the exclusive collective-bargaining representative of the Teamsters Local 537 Unit described above in paragraph 14 and is a mandatory subject for the purposes of collective bargaining.
- (c) Since about the dates listed in paragraphs 65(a)(i)–(xiii) and for an unreasonable time thereafter, Respondent, through its agents including Christopher Yost and Barbara Newell, has delayed, failed and refused to furnish Teamsters Local 537 with the information requested by it as described above in paragraphs 65(a)(i)–(xiii).

a. Background

The Respondent operates a distribution center in Aurora, Colorado, a suburb of Denver (the facility is also referred to as the Denver Distribution Center). The Charging Party Teamsters has represented at all relevant times certain of the distribution center's employees. This is the single facility of the Respondent represented by the Charging Party Teamsters. The facility falls within the Respondent's Rocky Mountain division. From March 1995 the Respondent's Rocky Mountain division labor relations attorney was Christopher Yost and the principal contract administrator within the department handling the Aurora center was Barbara Newell.

The parties had a history of litigation preceding the events in controversy herein. On February 25, 1994, the United States Court of Appeals for the Tenth Circuit approved a formal Board settlement respecting provision of information cases. Thereafter the Teamsters sued the Respondent in United States district court to compel arbitration respecting certain grievances. Also the Board in 1995 was in the process of considering contempt proceedings against the Respondent for noncompliance with the formal settlement and court order.

The parties negotiated a settlement of these matters in the spring of 1995 which was conditional on approval of the NLRB. The Board informed the parties both that it would not be seeking contempt and it would not agree to the terms of the settlement. Yost by letter of July 5, 1995, wrote Ed Modecker, the secretary-treasurer of Teamsters Local 537, with a further proposal. The letter states in part:

Albertson's will implement the terms of the settlements of certain "interim" grievances in exchange for the Teamsters Local No. 537's commitment to notify Albertson's Labor Relations Department in writing of any action or inaction that it believes violates or may violate the terms of the Tenth Circuit's Order (Civ. No. 94-9511) or the underlying order of the

NLRB. Further, Teamsters Local No. 537 agrees to provide Albertson's with a period of 30 days in which to cure the alleged violations(s) before the Union will make such allegations to the NLRB or any other agency or person. Finally, Teamsters Local No. 537 agrees to seek within 7 days of its receipt of payment on the above discussed settlements the voluntary dismissal with prejudice of the lawsuit to compel arbitration of the interim grievances now pending before the United States District Court for the District of Colorado, Civil Action No. 94-S-821.

The Union agreed, the Respondent's payments were made, and the lawsuit was dismissed.

b. Individual grievances—Complaint subparagraph 65(a)

Complaint subparagraphs 65(a)(i) through (xiii) list 13 separate grievances and associated information requests which are appropriately discussed separately below.

(1) Dale Pacheco grievance—Complaint subparagraph 65(a)(i)

(a) Facts

For many years represented unit employee Dale Pacheco had worked as a utility forklift operator. He took a medical leave of absence and was not assigned his former position on his return. On October 4, 1995, the Teamsters filed a grievance on Pacheco's behalf grieving the failure to assign Pacheco to his former job. Ted Textor, the Teamster's president and business agent on that date transmitted the grievance to Yost with a cover letter, which asked for "copies of any documents, or any medical records, upon which the company has based its decision to deny Mr. Pacheco his former position."

Contract Administrator Barbara Newell responded to the grievance by letter dated October 20, 1995, asserting in part:

Mr. Pacheco was injured on the job on April 20, 1995. As a result of his industrial injury, he was off work initially and them on temporary alternate work until September 23, 1995, when his physician indicated he reached maximum medical improvement (MMI). Once an employee reaches MMI, Albertson's tries to put the individual back to work. We looked at job restrictions and essential functions required to perform available positions. As indicated in the attached impairment Assessment, Mr. Pacheco's restrictions include lifting 20 to 40 pounds occasionally and less than 20 pounds frequently. He cannot repeatedly bend or twist at the waist. As you are aware, warehouse work available at Albertson's Denver Distribution Center requires repetitive bending, twisting and lifting up to 100 pounds. Mr. Pacheco cannot perform this work. His skills are being reviewed to determine if he is qualified for any other available positions within the distribution center.

The letter denied the grievance. Attached was a physician's impairment assessment dated September 21, 1995. On October 23, 1995, by letter to Newell, Textor appealed the grievance to arbitration.

Pacheco's health improved and he was released to unrestricted employment. In the late winter of 1995, Pacheco reported to Textor that he was working as an entry-level order selector and not as a utility forklift operator—his old job. Tex-

tor testified he spoke with Newell on the telephone in February 1996 respecting Pacheco. He took the position Pacheco had not been returned to his old job and Newell asserted he had.

The two exchanged letters in March with Textor sending Newell work schedules showing Pacheco working as an order selector and not a forklift driver and Newell responding that there were no seniority-based job assignment rights and that Pacheco was at work as a warehouse worker.

On April 2, 1996, Textor sent Newell a request for "the number of hours Mr. Pacheco has been working in the various job duties he has been assigned for each workday since he returned to work from his injury." Newell testified she forwarded the letter to the Respondent's outside counsel, Sandy Goldman, of the law firm of Holland and Hart, who had been assigned the Pacheco grievance for arbitration, assuming counsel would address it. Brian Mumaugh, also of the Holland and Hart firm who in fact handled the Pacheco arbitration, testified he assumed Newell would handle the request. Nothing was done and no response was made. On April 25, 1996, the Teamsters filed the underlying unfair labor practice charge.

The Pacheco arbitration hearing was scheduled for June 19, 1996. On June 13, counsel for Teamsters. Martin Buckley, sent Mumaugh a request for documents:

The Union hereby requests the following documents for the arbitration hearing in the [Pacheco grievance dated 10/4/95], scheduled for June 19, 1996: Copies of all Company records that show the job assignments of the day shift Perishable Department employees, and the hours each employee worked by job category, i.e., frozen forklift operator, frozen order selectors, ice cream selectors, frozen loader, meat lift, meat/deli lift, meat/deli receivers, produce lifts, produce checkers, etc., for each workday during the period from February 1, 1996 through May 31, 1996.

These documents should include, at a minimum, the daily Perishable day shift work schedules, the weekly T-Put production planners, productivity records for the Article 37 production standards, productivity records for employees other than order selectors, and any reports used by the Company to calculate hours out of selection. Please include any summaries, data compilations, or other records that contain any of this information.

Please provide these documents by June 18, 1996, at the latest, so that we can use them at the hearing on June 19

Mumaugh and Buckley communicated in the interim with Mumaugh informing Buckley he would be providing certain documents. Mumaugh testified without contradiction that Buckley agreed that the documents could be submitted the morning of the arbitration. The Respondent provided certain job assignment, work schedules and productivity documents the morning of the arbitration on June 19, 1996. At that time Mumaugh refused to provide the Thru put or T-Put production planners asserting they were both highly confidential and not relevant. He told Buckley that productivity reports for non-selectors did not exist. Finally he declined to produce documents showing hours worked by selectors in nonselection tasks.

Textor who attended the arbitration with Pacheco and Buckley, testified under examination by the General Counsel respecting the documents the Teamsters received and did not receive that had been requested in Buckley's June 13 request quoted above and referred to in the testimony as General Counsel's Exhibit 61:

Q. With respect to General Counsel Exhibit No. 61, would you take a look at it and if you can tell me what information set forth in that letter you never received or the union never received for that arbitration?

A. Let's see. In the first paragraph, I don't believe we received the bulk of that, if any. In the second paragraph we received the—we did receive a bunch of the perishable day shift work schedules. We didn't receive any of the T-Put production planners. We received some of the productivity records for the Article 37 production standards, not all of them and not the underlying documents.

We didn't receive any productivity records for employees other than order selectors and we didn't receive the reports used by the company to calculate hours out of selection. Those are summaries that they didn't produce. And then that last sentence in the second paragraph which says, the summaries data compilations, those we didn't receive.

Q. Now, you said you never received—while you were testifying you said you never received underlying docu-ments, what did you mean when you said that?

A. The order selectors fill out—they fill out forms that they've completed orders and whatnot. If it's in contention, what an order selector's productivity was, how many cases over what hours, what day and so forth, there is underlying documents that they generate and that the clerks that they hand them to generate to be able to substantiate the data that we did get from the company at the beginning of the hearing that day.

So we didn't get any of that. The underlying documents that prove the validity of the documents that we did get.

Q. So what sort of documents did you get?

A. We got just—they're a sheet that shows what the company claim was the order selection, how many cases an order selector selected on a certain day and over how many hours and then his average. But that was done by whoever, some clerk or some administrative person within the warehouse. It was not the actual underlying documents so that we could verify that those things were accurate.

On August 12, 1996, Newell sent Textor a letter with the following text respecting the Pacheco grievance:

You requested the number of hours Pacheco has been working in various job duties each workday since his return. An arbitration hearing was held June 19, 1996. I understand the union was provided with information before the arbitration hearing. Unless, I hear further from you, I will assume you have no need for additional information relevant to this grievance

(b) Analysis and conclusions

(i) The agreement to give notice prior to filing unfair labor practice charges

The Respondent argues that the July 6, 1995 agreement, quoted above, entered into with the Teamsters was not followed respecting the underlying charge. Thus, no warning or other notification was provided by the Teamsters before the April 25, 1996 charge was filed. The Respondent emphasizes on brief that Yost testified that the agreement with its notice and period to cure deficiencies was "extremely important" to him and that unless the parties had the opportunity to communicate before the NLRB became involved "then we were never going to be able to get the relationship off on the right foot." From this the Respondent argues: "Simply put, the union should not be allowed to profit from its clear breach of a binding agreement." (R. Posthearing Br., complaint par. 65 at 15.)

The General Counsel and the Teamsters emphasize both that the agreement was specifically rejected by the Board and that by its terms it addresses restrictions on, and a "curative period" predicate to, filing allegations that the Respondent was in violation of the court of appeal's order and the underlying Board Order and does not limit or address the filing of unfair labor practice charges. Counsel for the Teamsters on brief with numerous citations of authority points out that the Board with court approval has rejected the principle that private agreements may affect the Board's jurisdiction over unfair labor practices. See, e.g., Schuykill Metals Corp., 218 NLRB 317 (1975), Aacon Contraction, Inc., 127 NLRB 1250, 1269 (1960), NLRB v. General Motors Corp., 116 F.2d 306, 317 (7th Cir. 1940).

I agree with the General Counsel both that the agreement does not by its terms explicitly apply to the filing of charges and, more importantly, that the agreement does not limit the General Counsel respecting the instant charges. The cases cited by counsel for the Teamsters are on point. Further, the United States Supreme Court has recently approved a similar doctrine respecting another administrative agency. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

Accordingly, I find respecting this allegation, and others as noted infra, that the agreement does not limit the General Counsel in anyway in prosecuting the unfair labor practices based on the charges filed without compliance with the terms of the agreement.

(ii) The merits

The first information request within complaint subparagraph is the October 4, 1995 grievance based request for copies of any documents or any medical records upon which the company based its decision to deny Pacheco his former position. The Respondent argues that its October 20, 1995 answer was timely and responsive. The General Counsel and the Teamsters argue that the Respondent, more particularly Newell, deliberately misinterpreted the request which was directed to the Respondent's decision not to return Pacheco to his position as a forklift operator and "chose to respond with the Company's generic contention that it recognizes only the job of warehouse

employee and that Pacheco was unable to do the functions of a warehouse employee." (Teamster's at 31.)

Given the burden the General Counsel bears and the fact that the request does not with clarity call for a response of the type the General Counsel and the Teamsters argue was required, I find that there is insufficient evidence to find the October 20, 1995 response of Newell to the information request of October 4, 1995, was unreasonable based on a fair reading of the request or inconsistent with the obligations of the Respondent under Section 8(a)(5) of the Act to provide information. Accordingly, I shall not find a violation respecting this request.

The second information request of the complaint subparagraph is the April 2, 1996 request for the number of hours Pacheco had been working in the various job duties he had been assigned, for each workday since he returned to work from his injury. There was no response to this request and, as described in greater detail above, the Respondent in the assignment of the Pacheco arbitration from the Boise labor relations staff to outside counsel simply dropped the ball. The Respondent argues there was a forgivable miscommunication between inside and outside counsel offices and a consequent inadvertent omission to respond. The Respondent further notes disclosure took place in response to the Teamster's counsel, Buckley's June 13, 1996 information request on the morning of the arbitration hearing on June 18, 1996. Given this position it is appropriate to consider this second request in conjunction with the June 13 request.

On June 13, 1996, with the Pacheco arbitration set for June 19. Buckley by letter, quoted supra, requested of Mumaugh a variety of documents. Complaint subparagraph 65(a)(i) incorporates the entire June 13 information request in the allegation. The General Counsel argues that the letter asked for production on June 18, but the materials produced were produced only on the morning of the June 19 arbitration, delaying its start. The Respondent adduced evidence that the time of delivery was by agreement. I find on this record, as discussed above, the General Counsel has not met his burden of showing the contrary. If the disclosure was not improperly delayed, neither was the shortness of the time between request and due date a significant factor in the current dispute. The Respondent primarily defended its nondisclosure of certain materials on relevance and confidentiality grounds. The record does not suggest that there were materials or information that the Respondent told the Teamsters during the time preceding the arbitration that it would produce if given more time.

There are two separate elements in the parties' dispute respecting the June 13 information request and the June 19 disclosure. First, there is a dispute respecting, what was physically provided and what documents actually existed or did not exist to be provided. Second is the issue of the relevance of and/or confidentiality of certain information requested of, but withheld by, the Respondent on grounds of lack of relevance and confidentiality.

Counsel Mumaugh testified he turned over job assignment sheets which he identified as "work schedules which shows where people are going to work." He asserted that part of the information requested by the Union simply did not exist. He testified that he produced "the Article 37 productivity report"

also known as piece count reports, but that productivity records for employees other than order selectors did not exist. He testified that other elements of the requested information did not exist and that he let Buckley know during their conversations after the request was made that there were portions of the requested information that could not be provided. He was not certain however if he specifically informed Buckley that specific categories of information not provided at the arbitration were not provided because they did not exist. Mumaugh testified the documents that existed, but that he consciously withheld from the Union were: T-Put planners, summaries and data compilations underlying the productivity records and reports for calculating hours out of selection.

The General Counsel and the Teamsters argue that they did not in fact receive at the arbitration complete sets of the documents that the Respondent claims and Mumaugh indicated he provided. Textor who was involved with Buckley at the arbitration testified—as set forth in greater detail supra—he received a "bunch" of perishable day shift work schedules and some but not all, of the productivity records for article 37 production standards and no underlying documents. The General Counsel notes Mumaugh repeatedly testified he disclosed "some" records or records for "some" of the order selectors. Further the government notes that Mumaugh also admitted he never explained to Buckley in producing the documents precisely what was provided, what did not exist, or what was provided only in part.

I agree with the General Counsel that Mumaugh's testimony that he produced "some" of the documents in the categories described is not inconsistent with Textor's testimony that complete sets of documents were not supplied. I therefore credit Textor respecting the incomplete provision of documents on June 19.

Mumaugh testified he withheld the T-Put planners, summaries, and data compilations underlying the productivity records and reports for calculating hours out of selection, because they were not relevant to the issues in the arbitration. The Respondent argues they were not relevant and therefore there was no obligation to produce them. It is necessary to consider the issues in the arbitration to determine relevance.

The warehouse or distribution center had different types of work such as order selecting and forklift operation. The parties apparently at all material times had a fundamental dispute respecting how the various duties are organized and assigned in the workplace. The Respondent took the position that there was in effect one classification: warehouseman and an employee was that and nothing more. The Teamsters took the view that there were in fact positions such as order selector or forklift operator which were held by employees. Since there were certain contractual processes and entitlements to a job, the notion of what jobs existed was critical. In the case of Pacheco, prior to his medical leave he had functioned as a forklift operator and the Teamsters sought his reinstatement to that particular job. The Respondent's position applied to Pacheco was that he had been restored to the position of warehouseman and the Respondent carried no further obligation such as to assign him to specific duties within that job classification.

For the Respondent, litigation of its case-in-chief involved establishing its contractual position that a warehouseman is a warehouseman and subdistinctions within the classification are not contractually warranted. The Teamsters faced the need to establish their contractual position that the contract provides for entitlements to positions such as forklift driver within the warehouseman classification. The Teamsters' case had a second element however, they needed to further establish that Pacheco was entitled to such a subwarehouseman position, i.e., the forklift position. Thus, there was a need to establish that there were no relevant business factors defeating Pacheco's claim. Insofar as the record reflects, the Respondent took no active position challenging the facts asserted by the Teamsters as to this second issue, relying rather on their main argument that under the contract it was simply not possible to claim as a matter of right subpositions or duties within the classification.

The evidentiary issues relevant to the contractual question of the classification structure are both conceptually and practically independent of the evidentiary issues involved in establishing Pacheco's individual claim to a forklift job. The information claimed by the Respondent as irrelevant and immaterial to the litigation and not produced to the Teamsters is clearly not relevant to the contractual question. Textor testified in part to the use he hoped to make of the requested information in establishing the Teamster's claim. That use was clearly to establish Pacheco's right to the subwarehouseman's job he had previously held.

The Teamsters on brief cite *Leland Stanford Junior University*, 307 NLRB 75, 81 (1992), for the longstanding proposition that it is not the Respondent who establishes the relevance of requested information. Rather the union is entitled to information relevant to evaluating grievances and pressing them on to arbitration. See also my analysis respecting complaint subparagraph 65(a)(v), infra. On this record it is clear and I find that the information sought by the Teamsters was in fact relevant to a determination of the merits of the Pacheco grievance and convincing an arbitrator of that fact. Accordingly I find the information sought was relevant.

The Respondent also contends that the T-Put records were confidential. The T-Put or through put planner is a document prepared weekly by warehouse or distribution center management which contains in table form the weekly production in case units by time increments by various classification. The Respondent seeks to shelter the documents from disclosure both because of their format/organization and because of their data content. The format or approach is argued to be proprietary and deserving of protection from disclosure to competitors who might improperly benefit from the Respondent's work product. The Respondent argues that the data contained on a T-Put record would disclose either directly, or as a result of simple arithmetic manipulation of the figures, the total number of cases shipped and received, labor hours used and the inventory turns, i.e., the number of times the Respondent runs any one item through the center. Such information, the Respondent argues, would be of value to its competitors.

In my consideration of complaint subparagraph 65(a)(v), infra, I concluded that it was unnecessary to decide generally if the T-Put planners are sufficiently confidential that the Respondent may be able to withhold them from disclosure in grievance and arbitration settings. Rather I concluded that in the context of the refusal there presented—a simple refusal unleavened with offers of compromise or discussion of alternative, that the Respondent could not simply categorically refuse to disclose the documents. I reach the same conclusion here for the reasons set forth in that analysis.

I find therefore that the Respondent failed to meet its statutory obligation to disclose—or in the case of the T-Put planners at least discuss and explore the possibilities of compromise—the requested information and thereby violated Section 8(a)(5) and (1) of the Act.

(2) Robert Grauberger grievance—Complaint subparagraph 65(a)(ii)

Complaint subparagraphs 65(a)(ii) and (iv) address the two Robert Grauberger grievances. Only the first grievance is discussed here.

At relevant times the remuneration of drivers under the contract varied. A mileage-based system applied to deliveries made beyond a radius of 50 miles from the center and an hourly wage applied to deliveries within the 50-mile radius (sometimes referred to as a milk run). In the fall of 1995, single routes involving deliveries both within and without the 50-mile radius were assigned to drivers and compensation was paid on the mileage basis. From the drivers and the Teamster's perspective, that portion of the routes involving deliveries the inside the 50-mile radius driving involved the congestion and delay of the busy metropolitan roads area which were properly compensated on a time not mileage basis.

Driver Robert Grauberger wrote out a grievance on November 25, 1995. The grievance had the following description and adjustment desired:

DESCRIPTION OF GREVIANCE: [T]hey created a mileage run where there only needed two mileage runs on 11–5–5. I had a mileage run on 11–0–5, there also was a junior man who had [a] milk run 11–5–5 that was on the clock that should of had any extra mileage runs.

ADJUSTMENT DESIRED want the mileage run that I had paid by the hour instead of being paid by the mile.

The grievance came to Textor.

Textor testified that in the few days following November 25, 1995, he spoke to the Respondent's then Distribution Facility Trucking Manager Marty Mitchell about the Robert Grauberger grievance and that Mitchell initially told him that he would check with labor relations in Boise. Later, Textor recalled, Mitchell told him that he "didn't get anywhere" with Boise and Textor might as well file the grievance. Newell recalled talking to Mitchell about the grievance.

Textor sent the grievance to Yost on December 4, 1995, with a cover letter asking for a response and also asked:

Additionally, please forward to me copies of the bids and the dispatch records for all drivers who bid hourly or mileage mile runs, for the workweek ending November 25, 1995.

The matter was assigned to Newell. She testified that in her dealings with Textor she preferred to have things in writing. She further indicated she did not want to provide the requested information respecting the grievance until she was "crystal clear" concerning what the grievance was about. She spoke to Mitchell at the Distribution Center about the grievance and sent Textor the following letter with copy to Mitchell:

We received the grievance you filed on behalf of Grauberger. The allegations contained in this grievance are difficult to understand. Please verify exactly what Grauberger is grieving. I believe he alleges an extra mileage run was created on November 25, 1995, and that he took a mileage run on November 20, 1995. I believe his second allegation is that a junior hours employee took a mileage run on November 25, 1995.

Also please identify the junior driver to which he refers.

Once I receive this information from you, I will investigate what happened.

The letter, quoted in its entirety above, did not mention the requested information. Textor responded by letter of January 5, 1996, asserting "in order to remain timely, this letter will serve to appeal this grievance to arbitration." That letter did not respond to Newell's questions. Textor wrote again on January 11, 1996:

The issue Mr. Grauberger is grieving is the inclusion of numerous city (hourly delivery) stores with a relatively small amount of country stores (mileage delivery) and calling the resultant run a mileage run, and paying the driver at the mileage rates.

Prior to the grievance of Mr. Grauberger I had some discussion with Marty Mitchell regarding this issue. I explained to Mr. Mitchell that the contract specifically states that the pay provisions which apply to mileages runs are contained on page 24 and 25 of the current Labor Agreement at "Long Haul Drivers (drivers making run outside a radius of 50 miles from Aurora Distribution Center)." I have underlined the specific provision which Mr. Mitchell and I discussed.

Newell responded on February 1, 1996, denying the grievance without mentioning the earlier requested information. On February 6, 1996, Textor wrote Newell again indicating the Union was appealing the grievance to arbitration.

The charge was filed on April 25, 1996. On July 22, 1996, Newell sent Textor by facsimile transmission at least some of the information requested on November 25, 1995. On August 12, 1996, Newell send Textor a summary of information cases indicating that the information had been forwarded on July 22, 1996.

On April 28, 1997, Teamsters Council Buckley, wrote the Respondent's outside counsel respecting the April 30, 1997, arbitration of the Grauberger grievance. The letter requests:

Our copies of the dispatch records for the work week ending November 25, 1995, which were faxed to Local 537 by Albertson's are not clear or complete. Please bring complete and legible copies of the records with you to the hearing.

The General Counsel and the Teamsters argue that the initial lengthy delay in the provision of information from to November 25, 1995, to July 22, 1996,—8 months—and the illegible and incomplete transmission of the information at that time constitute a clear violation of Section 8(a)(5) of the Act.

The Respondent argues that its agent, Newell, initially did not understand the grievance. Once the grievance had been clarified she reasonably believed the information request was moot—a fact confirmed by the Union's failure to renew its request or complain to the Respondent before filing the unfair labor practice charge. Indeed Newell testified that at no time did she ever think the material was relevant or that there was an obligation to provide it to the Union and that she did so only at her superiors' instruction. Respecting the dispute regarding the completeness of the July 22, 1996 transmission, the Respondent argues Newell's version of what she sent rather than the Union's should be credited. Finally the Respondent argues that the Teamsters were not prejudiced by the Respondent's production of the documents.

In considering the arguments of the parties I am mindful of the government's cited case, *Gloversville Embossing Corp.*, 314 NLRB 1258 (1994), that the adequacy of a labor union's information request must be judged in the light of the entire pattern of facts available to the employer and not just the bare words of the request itself. This matter is a good example of a situation calling for application of that learned doctrine.

The parties disagree on Newell's lack of understanding of the grievance and the relevance of the information sought and the reasonableness of her understandings. The record is clear from her own testimony and that of Textor respecting the reports of Mitchell that Newell had considerable information from the distribution centers trucking department management respecting what the grievance at issue was all about even before it was filed.

Repeating a pattern seen in other grievance information requests and even as a witness during the instant proceeding,45 Newell, in my view displayed a pattern of behavior characterized by the aphorism that there are none so blind as those who will not see. She testified that she did not believe in supplying requested information to the requesting union until her understanding of the grievance was "crystal clear." She did not believe in dealing by telephone with the union representative regarding grievances, but rather communicated her questions by letter and assumed that, if the Union did not pursue a matter, it had been abandoned. The total protocol described by Newell respecting her dealings with information requests, was that if she did not understand them, she did not have to deal with them. By her admission, frequently in travel status and overworked, with no one to help her, I conclude that Newell came quickly and comfortably to the frequent conclusion that the

⁴⁵ During her testimony Newell repeatedly gave nonresponsive answers to opposing counsel despite instruction from the bench. I formed the impression that at some deeper level Newell believes, or governed her conduct as if she believed, that she was not bound to answer or reply responsively to questions she did not find reasonable or which might require an answer that did not advance her view or position, and at least on occasion would in such circumstances give an answer or reply to such a question a nonresponsive statement that that simply advanced her point of view.

Union's information requests were out of order and need not be paid consistent or timely attention.

From all of the above, including my observation of the demeanor of Newell during her testimony, I find that Newell either knew or, more importantly, should have known enough of the Union's grievance and the information request, so that she was duty bound either to comply with the information request or to have specifically and timely communicated with the Union respecting it. The fact that Newell well knew of the importance of the matter from distribution center management, knew that the grievance was going to arbitration and could testify that she did not deal with the information request because she simply believed that the Teamsters did not want the information anymore strains belief. There is no question in my mind that the General Counsel has sustained his burden of showing that the Respondent acted in bad faith and in violation of the Act in simply disregarding the Union's information request for the 8 months at issue herein.

Respecting the dispute regarding what was sent or not sent by Newell with her letter of July 22, 1996, and considering the testimony respecting the competing exhibits offered as being the accompanying documents, I credit Textor over Newell and find the transmission was General Counsel's Exhibit 68 rather than Respondent's Exhibit 140. I find therefore that the response was incomplete and in part illegible. I do not find however that it was so incomplete as to be derisory or a further sign of bad faith. In such circumstances, I find the document transmittal was sufficient to shift the burden of renewing the request to the Union. I therefore find that the Union, after it received the transmission, was obligated to complain to the Respondent respecting its inadequacies. When the Union thereafter did so, the Respondent's obligation to produce a complete and legible response was renewed. Since the final request occurred just before the arbitration, and because the materials were apparently brought to the arbitration as requested by the Union, I decline to find that the violation renewed at that time.

Respecting the Respondent's argument that the Teamsters were not harmed by any delay in provision of information, I reject the argument as a matter of law. Information always provides greater certainty, lessening the unknown elements in contested situations and allowing the informed party to make better decisions and judgments. Information may promote withdrawal of a grievance, a more flexible settlement position or the opposite. Information may inform strategy or even stimulate education of the workforce for better results in later disputes. Finally, on the facts of this case, the period when the information was wrongfully withheld was coincident with the Union's assignment of counsel and the holding of an arbitration hearing and the ultimate rendering of a decision on the grievance. The grievance was resolved the "long hard way." While it is not known whether the timely provision of the requested information would have rendered the process swifter, more economical or produced a different result, it is also impossible to say the Respondent's wrongful lack of disclosure caused no prejudice to the Teamsters.

Accordingly, based on all the above and the record as a whole, I find that the Respondent acted in bad faith in failing to respond to the Teamsters December 4, 1995 information re-

quest until July 22, 1996, and thereby violated Section 8(a)(5) and (1) of the Act as alleged in complaint subparagraph 65(a)(ii).

(3) The Martin Tara grievance—Complaint subparagraph 65(a)(iii)

Employee Martin Tara returned to work as an order selector on December 18, 1995, from a medical leave of absence. He thereafter received a written warning for not meeting productivity standards which the Union grieved on January 29, 1995. That grievance was accompanied by a request for "all medical records" respecting his disability and his production records for the work period in for which he was disciplined. Tara was thereafter discharged and submitted a grievance dated February 11, 1996, contending he had been suspended without cause. Textor sent the grievance to Yost over a cover letter dated February 12, 1996, which contained the following information request:

Additionally, please forward to me copies of all documents, witness statements and/or supervisor reports upon which the company believes it had cause to discipline Mr. Tara. Please forward this information by Friday March 8, 1996.

Newell requested the distribution center to supply information to her about the Tara grievances. She was supplied with several medical reports, a medical recapitulation, and a memorandum from Distribution Center Manager Gagnor to Newell describing the documents under cover and asserting:

Marty Tara feels he should not be subject to discipline while he is on restricted hours even though the doctor has released him to perform at full duty during those hours. In the 1/17/98 report the doctor even made note of his "making quota."

By letter dated March 6, 1996, Newell responded to both the January 26 and February 11, 1996 Tara grievances in a single letter. She asserted that Tara had been off work until December 18, 1995, following an on the job injury and that he was fully released to return to work on December 18, 1995. Newell added:

As you can see on the enclosed report, on January 17, 1996, Mr. Tara's physician released him to work "making quota." Mr. Tara received a written warning for the week ending January 20, 1996, five weeks after he was released to full duty.

⁴⁶ The Charging Party Teamsters seek to include this information request and the Respondent's response to it in the complaint as an additional allegation and urges I find the Respondent's response a violation of the Act. Counsel argues the matter was a fully litigated part of the case. The counsel for the General Counsel explicitly stated the request was placed in evidence as "background" and the Respondent relied on those representations in not objecting to the receipt of the evidence. The General Counsel under the statute has plenary control over the complaint. When the counsel for the General Counsel expressly disavows including a matter in either the complaint or the theory of a violation, the doctrine that a matter fully litigated may be found to violate the Act cannot apply. The Government in such a case by its express disavowal bars finding it a violation however fully it is litigated. The Teamsters motion to consider this request and response as a potential unfair labor practice is therefore denied.

She noted that Tara's productivity was the basis for the discipline and concluded: "As you requested, enclosed are the written warning, suspension notice and weekly production sheets." Enclosed with the letter was a January 17, 1996 patient status report releasing Tara to full "quota," three "Employee Conduct Reports"—one for the week ending January 20 and two copies of one for the week ending January 27. The reports were the initiating documents for the warning and suspension underlying the grievances. The reports that recited the specifics of insufficient production figures were accompanied by computer printouts giving Tara's productivity for the days of the week involved in the respective discipline. The letter did not address the request for statements.

The Newell letter did not enclose any medical records the distribution center provided her other than the January 17, 1996 report. Thus, she did not send the Union the December 18, 1995 medical report, a January 30, 1996 medical summary showing Tara as eligible for 4 hours per day full duty as of December 18, 6 hours per day of full duty as of January 8, 1996, and 4 hours of full duty as of January 17, 1996, or several other patient status reports.

The charge was filed on April 25, 1996. On August 12, 1996, Newell send Textor a summary of information cases including the following paragraph:

Martin Tara 2/11/96: I provided appropriate productivity records the written warning, and the relevant suspension notes to you on March 6, 1996. Jack Gangnon's notes indicate Tara felt he should not be subject to discipline while he is on restricted hours even though his doctor released him to perform full duty during those hours and specifically mentioned Tara's "making quota" in his January 17, 1996 report. There are no "witness" statements for us to summarize.

Counsel for the Teamsters argues on brief at 41:

The duty to provide information requires that an employer provide *complete* [emphasis in original] information not data that it has selectively culled in support of its position. See *Harowe Servo Controls, Inc.*, 250 NLRB 959, 1042–[10]45 (1980). . . The distribution center manager, Gagnon, clearly understood the scope of the information requested by the Union and supplied it internally to Newell. She impermissibly narrowed the board discovery-type standard for providing information. The employer may not provide only what it deems relevant and helpful to its position. *Leland Stanford Junior University*, 307 NLRB 75, 81 (1992). . . .

By not providing the complete medical reports and recap, Gagnon's memo [footnote omitted], and the daily productivity data, Respondent responded inadequately to the Teamster's request for information about the Tara grievances. Thus Respondent violated its duty to provide relevant information.

The General Counsel argues:

Newell was required by Board law to notify the Teamsters that witness statements did not exist with reasonable dispatch in a timely manner. *Postal Service*, 332 NLRB [635, 636]

(2000); Woodland Clinic, [331 NLRB 735 (2000)]; Finn Industries, Inc., [314 NLRB 556 (1994)]; Civil Service Employees Assn., Inc., [311 NLRB 6 (1993)]. (The GC Br. at 125.)

The Respondent argues initially that since the information request of January 29, 1996, was not pled as an information request which the Respondent failed to properly respond to—an omission discussed at trial and relied on by the Respondent, no information request for medical or production records is involved in resolving the complaint allegation. Rather the only request at issue should be that made on February 12, 1996, calling for all documents, witness statements, and/or supervisor reports upon which Respondent relied to discipline the grievant.

Respecting those specific documents, counsel for the Respondent notes, the Respondent produced the computer production records for the grievant which had weekly totals of daily production on which it relied. It did not produce the postdiscipline memo of Gagnon since it was not relied on to discipline Tara. Finally, the Respondent, argues, although it did not inform the Teamsters that there were no witness statements until Newell's letter of August 12, 1996, "[T]his is not a violation since the Act does not require the responding party to provide a litany of non-existent documents." (R. Br., complaint par. 65 at 53.)

It is appropriate to address the significance of the Teamsters January 29, 1995 information request to the complaint allegations respecting the February 12, 1996 information request. Counsel for the General Counsel in an exercise of her statutory discretion chose not to plead the January 29 information request or the Respondent's response to it as a violation of the Act and reiterated that fact at trial. The Teamsters efforts on brief to reverse that judgment and include the request as another constructive count of the complaint has been denied, supra.

Therefore in analyzing the issues respecting the February 12 request, it will be in a sense as if the January 29 request had never been made or perhaps more technically, will be as if the January 29 request were time barred by Section 10(b) of the Act. The entire series of events are properly considered as background, however, much as is true with events outside the Section 10(b) period. And, importantly, the fact that an information request was made on January 29 does not limit the analysis of the February 12 request. In sum, I find that the January request is neither sword nor shield to the allegations respecting the February 12 request.

The February 12 request sought: "all documents, witness statements and/or supervisor reports upon which the company believes it had cause to discipline Mr. Tara." Respecting production documents, there is no evidence that the Respondent relied on other than the production records provided to discipline Tara. I find therefore that this aspect of the request was satisfied in a timely manner. Similarly, I find that the provided disciplinary memoranda were all the existing documents at the time of the discipline and were therefore timely supplied. While the Gagnon transmittal memo to Newell was not supplied, it does not fall within the reasonable reach of the request. As to these elements of complaint subparagraph 65(a)(iii) the

General Counsel has failed to prove his case and they shall be dismissed.

Respecting the request for witness statements and the Respondent's silence respecting the request until the July 22, 1996 statement of Newell telling the Teamsters for the first time that there were no statements, I find the Respondent acted unreasonably and in violation of Section 8(a)(5) of the Act. I reject the Respondent's argument that there is no obligation under the Act to answer an information request for certain documents with a statement that no such documents exist. The General Counsel's cited cases are apposite. It is often as important to know things do not exist as that they do. Keeping the Teamsters in doubt for over 5 months by standing silent and unresponsive was unreasonable and constitutes a violation of the Act as alleged.

The issue respecting the medical records of Tara is whether or not they reasonably fall into the scope of the February 12 request as documents relied on by the Respondent in deciding to discipline Tara. I find there is no question that they do. I make this finding even though I have explicitly ruled that the earlier information request does not expand the reach of the complaint. Indeed I would make this finding even had the January 29 request never been made.

The medical records of Tara were important to the Respondent and relied on by it because he had just been returned to work following an on the job injury. The record is clear that Tara's job of order selector is both strenuous and fast paced. There is simply no question that a decision to discipline a returning employee to such a position while operating under work time limitations would involve reliance on his medical records. And, indeed, it is clear from the Gannon memo, quoted supra, that the Respondent's agents did in fact review those records and relied on certain of them in disciplining Tara. Finally, I find that Newell knew or reasonably should have known that this was the case. Her March 6 communication to the Union shows that she well understood that medical reports had been relied on by the distribution center in reaching its decision.

The Teamsters in the argument quoted above assert that the Respondent cannot be selective in the information it provides. That is of course true if, and only if, the request is for an entire class of documents and the Respondent's response holds back a portion of the documents requested. The Teamsters and the Government argue that the union request encompasses all medical records, i.e., includes the records not provided by Newell. The implicit fact on which these arguments depend is that the Teamsters request for: "all documents . . . upon which the company believes it had cause to discipline Mr. Tara," may be reasonably found to include all the documents or just the ones given to the Union.

I find that the information request was narrow and specific. Importantly, it did not ask for all Tara's medical records only the ones the Respondent believed supported its case. It is clear from Gagnon's memo and Newell's March 6 letter to Textor that the Respondent was relying on the single Medical record it provided. Indeed when the Teamsters and the Government complain that the Respondent only provided medical records favorable to the Respondent, that assertion seems to confirm that the Respondent did just that, i.e., Newell provided the

medical record on which it relied and no others. In my view the single medical record that Newell provided is all that the request calls for. If the Teamsters wanted all medical records in a similar situation, they were free to ask for them.⁴⁷ They did not do so in the February request at issue and therefore the Respondent will not be held to account for providing more than it was asked for in this respect. I find therefore that as to medical records, the Respondent did not fail to respond to the February 12 information request in violation of Section 8(a)(5) of the Act. This aspect of complaint subparagraph 65(a)(iii) will be dismissed.

(4) The second Robert Grauberger grievance— Complaint subparagraph 65(a)(iv)

Robert Grauberger signed and dated a grievance on February 22, 1996, challenging discipline arising out of February 12, 1996 truck unloading events. By letter dated February 28, 1996, Textor sent the grievance to Yost. The letter also sought: "copies of the company's policy regarding store delays and any other written warnings to any other drivers for a similar alleged offense for the period of January 1, 1996, to the present."

Newell responded by letter of March 25, 1996, asserted the grievance was out of time in that the grievant received a warning on February 12, while the Teamsters did not file the grievance until February 28, 1996, "past the 15-day period." The letter concluded:

Without waiving any rights concerning this grievance, we would be willing to discuss with you the events leading to Mr. Grauberger's written warning. Please call if you would like to do this

The Teamsters on March 29, 1996, by letter to Newell, appealed the grievance to arbitration.

Newell testified she believed the grievance was untimely and for that reason did not feel she had an obligation to provide the requested information. Textor testified that because the warning was dated February 13, 1996, the grievance was timely. No information was supplied, no further communication took place. The charge was filed on April 25, 1996.

In Newell's summarizing report sent to the Union on August 12, 1996, she states that she was enclosing a memo addressing delay time that had been distributed to drivers on January 11, 1996. The grievance was ultimately withdrawn by the Union.

The issue respecting this matter is tightly focused. There is no dispute respecting the relevance of the information requested or the fact that the information was not supplied until 5 months after the information was requested. The issue is simply whether or not on this record the Respondent was privileged to withhold the requested information because it believed the grievance was out of time.

The General Counsel and the Teamsters argue that the employers of the world virtually by definition view grievances filed by unions against the employer's conduct as nonmeritorious, but remain obligated to respond to proper information

⁴⁷ Clearly Textor did in fact make the broader request for medical records earlier in January, but that request is not part of the complaint and, as discussed supra, must be disregarded for purposes of determining if the Respondent was sufficiently responsive to the second request.

requests associated with those grievances. Here they argue, the matter was not frivolous, was appealed to arbitration by the Union and, in fact, was timely since the grievance was filed within the necessary time period by the Union given the date of the discipline was 2 days after the events underlying it. Counsel for the Teamsters notes, on brief at 43:

In any case, the issue whether a grievance is timely should be decided by an arbitrator, not Respondent. Arbitrators decide questions of "procedural arbitrability," such as timeliness. Federal courts decide questions of "substantive arbitratibility," i.e. whether the parties have agreed to submit the subject matter of a grievance matter to arbitration. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

The Respondent argues that it had a good-faith belief that the grievance was time barred, communicated that fact to the Union, and did not receive a response explaining the Teamsters claim to timeliness. Rather than communicate with the Respondent the Teamsters simply filed a charge. In such a situation, argues the Respondent, no violation has occurred.

I agree with the Government and the Charging Party that even a good-faith belief that a grievance is time barred does not relieve the Respondent of a duty to provide the information requested or initiate contacts with the Union to pursue the issue further when that good-faith belief is incorrect, the issue is a close one, or the matter merits arbitral resolution as opposed to the situation not present here where the grievance is a palpably erroneous and invalid filing. I reject the Respondent's argument that it could simply claim the grievance was untimely and never mention or address the information request thereafter putting the burden on the Union to renew the request or initiate additional contacts.

Further, I do not accept the Respondent's assertions that the Respondent had a good-faith belief that the grievance was out of time. I find the conduct involving this grievance to be part of a pattern involving Newell, who on this record had demonstrated a pattern of all to quickly coming to the conclusion that the Union does not deserve having its information requests acknowledged let alone granted for various reasons including in this case because the grievance was in her view without merit. The Respondent's conclusionary investigation followed by the simple assumption that the grievance was out of time does not support a good-faith belief nor does it justify simply dropping the matter without further investigation or consideration of the request. Here, the Respondent should have obtained and reviewed the discipline document and would have seen that the date it bore made the grievance timely and or the issue of timeliness clearly arbitral.

Respecting the Respondent's claim that it properly put the duty to initiate further contact on the Teamsters by Newell's letter of March 25, I find that it did not. The letter—as often occurred in Newell's letters to the Union—did not mention the information request. Further the argument that the Teamsters' agent could simply telephone the Respondent works the other way—the Respondent could simply call the Teamsters. During the period however it is clear that the relationship between Textor and Newell was such that telephonic discussions were not and had not been effective as a way of resolving matters.

Given all the above, I find the Respondent had no excuse in fact or law for not properly responding to the information request in a timely manner violated Section 8(a)(5) and (1) of the Act.

(5) The McCovy/Rosenwald grievances— Complaint subparagraph 65(a)(v)

McCovy and Rosenwald filed grievances on April 24, 1995: McCovy grieving his removal from the forklift position on the grocery department swing shift and Rosenwald grieving his removal from a transporter position on the perishable department swing shift. Textor transmitted them to the Respondent on April 24, 1995.

The two grievances were found nonmeritorious by the Respondent. The dispute was another example of the disagreement between the Respondent and the Union regarding what jobs were bid jobs within the distribution center. The Respondent took the position that the sole job at the center was "warehouseman" and within that job it could create and eliminate subjobs and assign, remove and transfer warehouse-men to these subjobs as it desired with no obligation to honor seniority rights or bidding for those subwarehouseman positions. The Teamsters viewed those subpositions such as forklift operator or transporter as jobs with their own seniority and bid based job rights.

These two grievances advanced to arbitration as a single matter scheduled to be heard on March 12, 1996. On March 4, 1996, Counsel Buckley sent Counsel Mumaugh the following information request:

In preparation for the upcoming hearing in the [McCovy/Rosenwald grievances], the Union requests copies of any and all Company records that show the job assignments of the swing shift employees for both the Grocery Department and the Perishable Department, and the hours such employees worked by job category, i.e., order selecting, loading, forklift, receiving, transporting, etc. We request such records for each work day during the periods April 1 through April 30, 1995, June 1 through June 30, 1995, and November 1 through November 30, 1995.

These documents should include, at a minimum, the daily shift schedules (example enclosed), the weekly T-Put production planners (example enclosed), productivity records for the Article 37 production standards (such as daily production reports, example enclosed), productivity records for employees other than order selectors, and any reports used by the company to calculate the enclosure marked "Union Exhibit 10." Also, if the Company has any summaries, data compilations, or other records that contain any of this information, please produce them as well.

We would like to have these documents by March 8, 1996, at the latest, so that we can use them at the March 12, 1996, arbitration hearing.

Attached to the request was a multi-page T-Put planner document, daily productivity reports for individual employees marked as company exhibits from earlier arbitrations and "Un-

ion 10" a 3-week compilation for departmental employees showing total hours worked in and out of selection.

Counsel Mumaugh testified he received the request a few days later but did not respond because settlement negotiations were underway and the arbitration date had been reset at the Respondent's request to April 11, 1996. Buckley, having not received a response to his request, sent a second request on April 4, 1996, asking the information be "provided immediately"

Mumaugh responded by letter dated April 5, 1996, stating in part:

[C]oncerning your information request. . . .

First most, if not all, of the information you have requested is confidential and proprietary business information, Albertson's maintains that that is reason enough to withhold the information. Second, even if the information you requested was not confidential business information, you have failed to explain how it is relevant to the processing of this grievance. This case is about whether the Company followed Article 26 of the contract. None of this information was relevant to the Doherty case where the parties relied on their respective interpretations of the Collective Bargaining Agreement and the relevant negotiating history. Thus, in the absence of any explanation from the Union as to how this information is relevant to this grievance, there is no basis for producing it to you.

The reference to the Doherty case deals with the Doherty grievance and arbitration which had been held and the decision received just before the information requests involved herein were made. In the Doherty case, the parties took similar positions to those herein respecting the elimination of a distribution center warehouseman bakery selector position with the Respondent claiming the right to act at will respecting subwarehouseman positions and the Teamsters asserting such positions have seniority rights. At the arbitration the Respondent stood on its contractual argument that it had an unfettered right to change such jobs. The Respondent also introduced evidence Mumaugh believed related to additional relevant business factors. The Respondent argues it did so however only when, as Respondent counsel characterized:

[I]t had become clear that the arbitrator was leaning in the direction of requiring evidence of relevant business factors, that the company produced, at the arbitrator's request [underlining in original], evidence to support a rebuttal argument "that management has some other reasons and justifications for doing what it did as a relevant business factor." [Tr. 7096–7097, 712–753. The Respondent's brief at complaint paragraph 65 at 50.]

The arbitrator in his decision did not accept the Respondent's contract defense that it could make changes in such positions without limit, but rather held that the Respondent had to have relevant reasons to take action involving these subwarehouseman positions. The Respondent does not accept the arbitrator's interpretation of the agreement.

No further communication took place regarding the request. The arbitration began on April 11, 1996. Mumaugh testified he

waited until the hearing to produce some of the requested information because he had not received a response from the Union and that he brought those documents to the hearing he "thought would be appropriate." A dispute exists respecting what was turned over at the arbitration. The charge was filed on April 25, 1996, and the arbitration concluded on May 14, 1996.

The General Counsel and the Charging Party Teamsters argue that the documents and records requested were relevant to the arbitration, were not confidential records or, if they had been at one time, the confidentiality had been waived. They further note that even were the documents confidential, the Respondent was not entitled to simply withhold them but rather was obligated to negotiate with the Teamsters respecting a way that the information could be used while the confidentiality of the documents protected. Because the Respondent failed and refused to do so, they argue, the Respondent violated that Act in all events.

Turning first to the issue of relevance, the Respondent argues: (1) that its defense to the grievance was based on the contractual interpretation, described above, and (2) that it simply had the right to do what it did. Thus it argues, the records, purportedly needed to provide a defense to a business necessity case, were not needed and did not need to be disclosed. I reject this argument. The Respondent's argument is framed entirely from its perspective and the relevance question here must be decided from the Teamster's point of view. Surely it was prudent for the Teamster's in preparing for litigation and for possible settlement to have examined the evidence to meet such a defense. As in the Doherty case, indeed in trial litigation generally, circumstances change rapidly. The records sought were relevant to business consideration issues. The Teamsters were prudent to desire to be prepared for the eventuality that that issue would be litigated. Nor may the Respondent seek shelter behind Mumaugh's statements to Buckley that the records were irrelevant and would be withheld unless their relevance was demonstrated. Mumaugh asserted: "None of this information was relevant to the Doherty case." I find that statement simply incorrect. The requested information was clearly relevant and the Respondent could not shift the burden to the Teamsters to justify the request. Accordingly, I find the information requested was relevant.

Having found the requested documents were relevant, the Respondent's failure and refusal to provide the requested information regarding time worked out of selection was unreasonable and violated Section 8(a)(5) and (1) of the Act. The Teamsters sought daily production reports and received weekly figures without explanation. This failure also violates Section 8(a)(5) and (1) of the Act.

The Teamsters sought T-Put planners to show there was sufficient work—from the Teamster's view—in the grievant's bid positions to justify their retention in those positions. The issue of confidentiality was raised by the Respondent in refusing to disclose the documents to the Teamsters.

The issues which arise respecting the right to withhold documents based on confidentiality are often numerous. A document or class of documents must meet the tests of confidentiality. The document or class of documents, if confidential,

must have been treated as confidential by the employer so that any confidentiality assertion is not waived by conduct. The relative need to preserve confidentiality of a given document or class of documents must be balanced against the need of the requesting labor organization for that information. Finally, the employer may not simply refuse to disclose the document or class of document, but must meet and discuss the possible withholding with the requesting labor organization to consider alternatives such as limited disclosure or limited use or confidentiality agreements.

The Government and the Teamsters argue that the documents are not properly confidential, that any confidentiality was waived by earlier use and disclosure and that even were the documents confidential, the Union had on balance a superior need for the information as compared to the Respondent's need to maintain confidentiality. Finally the General Counsel and the Teamsters argue that the Respondent at no time made any attempt to reach some accommodation respecting the T-Put planners, such as seeking a confidentiality or limited use agreement, but rather simply and imperiously withheld them.

The Respondent adduced evidence respecting its handling of the T-Put planners and challenged the Teamsters contentions that the records had been disclosed by or used in litigation by the Respondent against the Teamsters. The Respondent argues that the partial or incomplete documents the Union had in its possession and which it offered into evidence in earlier proceedings did not come from the Respondent and, in all events, should at the very most be regarded as a waiver of confidentiality only as to those actual documents and not as to those not disclosed by the Respondent.

I find that is it not necessary to determine if the T-Put planners involved herein—other than those already in the possession of the Teamsters⁴⁸ considered in isolation were confidential, because in the circumstances presented here the Respondent was not entitled as the General Counsel and the Teamsters have argued, to simply refuse to disclose the documents without discussing alternatives. In the instant setting, where the request for documents was simply denied and no compromises were offered or solicited, I find the confidentiality defense does not lie. *Reiss Viking*, 312 NLRB 622 fn. 4 (1993). Accordingly, I find that the Respondent in not disclosing the T-Put planners or proposing and considering alternative disclosure possibilities, violated Section 8(a)(5) and (1) of the Act.

(6) Dean Harrison grievance—Complaint subparagraph 65(a)(vi)

Employee Dean Harrison in early March 1996 bid on a forklift job previously held by employee Covell in the warehouse grocery department and did not receive it. He grieved. Textor submitted the grievance to Yost by letter dated March 5, 1996. The letter asked for "copies of any documents or any criteria upon which the company based its decision to not place Mr. Harrison in the position held by Mr. Covell." Textor testified he viewed the grievance as similar to the earlier grievances, discussed supra, respecting subwarehouseman positions within the distribution center. He hoped to obtain the same type of information: T-Put planners, production and productivity records, and related documentation.

Newell testified she received the grievance and request and contacted the distribution center. She sent an April 1, 1996 memo to Jack Gagnor at the distribution center seeking information on various grievances quoting essentially verbatim from the information requests made and asking for the requested information to be provided her in 3 days, "no later than Thursday, April 4, 1996." She did not suggest that there was a delay in obtaining her requested information from the distribution center. Presumably she received the documentation within the time limits set.

Newell also testified she was out of town on business for almost 2 consecutive weeks during this period and could not review the information she received. Newell responded by letter dated April 15, 1996, denying the grievance and reiterating the Respondent's position that no "bid" jobs existed at the distribution center, that experienced employees may request consideration for other jobs, and that such employees would be given consideration before less senior employees or a new employee was hired for such a job. She continued:

Presently, there is no "opening" for a forklift job. The job previously performed by Mr. Covell has not been filled by a less-senior employee or someone from outside the company. The company determined that it would be more efficient to eliminate that slot.

The letter did not specifically refer to the information request nor provide documents.

Newell testified that she regarded her letter as fully responding to the information request. She testified:

There were documents to provide, but I did explain the reason why we did what we did, which is what we were asked to do, the other criteria upon which we made our decision.

Thus, she argued, given the choice of providing documents "or" criteria, she provided the latter.

Textor testified that he initiated a telephone conversation with Newell on April 16, 1996, respecting another matter and was insulted by Newell, told by her he was a liar and hung up on. This conduct by Newell made it difficult to communicate with her and he elected not to attempt to discuss the instant matter with her.

Textor wrote to Newell on April 17, 1996, appealing the grievance to arbitration and concluding:

Additionally, the company has not provided the information requested in the cover letter dated March 5, 1996, forwarding the grievance. Please provide this information by Friday, May 4, 1996.

The charge was filed on April 25, 1996.

⁴⁸ Because there was an issue at trial respecting the Respondent's desire to limit the use of the T-Put Planners already in the Teamsters possession, it is appropriate to consider and I find that those documents are not confidential in the sense that their use by the Teamsters should be limited by order in this proceeding. I find the documents at issue are partial, long out of date, and there is no basis given these factors as well as the history of the Teamsters gaining possession of the documents, to find the Teamsters should have their use of those particular documents limited by order in this case.

Newell replied to Textor's letter of April 17 by letter of April 29, 1996:

Please refer to my April 16, [49] 1996, response to Mr. Harrison's grievance. As stated therein, Albertson's management is not obligated by the terms of the current labor agreement to assign Mr. Harrison any particular job in the warehouse. Further, no jobs have been filled which would be subject to the procedures contained in Article 26. Accordingly I do not understand what information you are seeking. Please explain further what information you would like me to provide.

On August 12, 1996, in Newell's summary letter she addresses this grievance and information request as follows:

Dean Harrison 3/4/96: I have responded repeatedly regarding your request for information concerning this grievance. As I stated previously, I have not identified any relevant, nonconfidential documents responsive to your request. The following is a summary of Albertson 's reasons for not filling the forklift assignment previously held by Mr. Covell. First, the decision was made to provide more cross-training opportunities. All warehouse workers are required to be able to perform multiple warehouse assignments. Eliminating one regularly assigned forklift position will allow many of the warehouse workers to become more proficient and experienced in performing forklift duties. Second, the decision was made to facilitate the Company's fulfillment of its obligations under Article 37, which requires the Company to use its best efforts to assign employees (who selected 30 or more hours in the previous workweek) to warehouse job duties outside the selection/productivity system. The Company's decision also may enhance the productivity of warehouse workers who will be rotated outside the selection/productivity system on a more frequent basis. According to Arbitrator Allen's decision in a recent arbitration concerning the same issue, "nothing in the contract prevents the Company from making changes in operations intended to improve the efficiency, effectiveness, and service to retain stores.

No documents were ever provided.

The General Counsel and the Teamsters argue that the information request was for presumptively relevant information. Further, the request read fairly called for documents showing alternatively any written criteria or any other documents on which the Respondent relied to take the grieved decision. They argue that the Respondent's initial response was tardy and inadequate and also false. When pressed with a renewed request, the Respondent's response was simple stonewalling—the "I do not understand" mantra so often affected by Newell in refusing to provide information. Counsel for the General Counsel argues on brief at 48:

Newell asserted that her refusal to provide available documents was justified by her hyper-technical reading of Textor's requests in the disjunctive. However, "the adequacy of a union's request for information must be judged in light of 'the entire pattern of facts available to the (employer)' not just the

bare words of the request itself." [Gloversville Embossing Corp., 314 NLRB 1258 (1994) (incomplete response based on alleged misreading of request for information), quoting from Ohio Power Co., 216 NLRB 987, 990 (1975).]

The Respondent argues that the request at issue provided the Respondent with an option of supplying either documents or the criteria upon which the Company based its decision to deny the grievant the position. "Albertson's asserts that it was not required to produce any documents under the unambiguous terms of the request and that no relevant documents exist." (R. Br., complaint par. 65, at 94.)

The record makes clear that at least during the period of time the information requests of complaint paragraph 65 were in contention, that relations between Textor and Newell were brittle. The two were not able to communicate by telephone with comfort or success and doubtless each viewed with suspicion and alarm the other's words and actions. From this perspective the General Counsel and the Teamsters argue that Newell would continuously, obdurately, and with evident malice, thwart the Teamsters information requests by prolonged and unreasonable delays in responding, by claiming lack of understanding of the requests, and by selectively providing documents and or misstating the state of the records available to be disclosed. The Respondent argues that Newell simply read the information request and responded to it consistent with its conditional terms.

I find the fact that Textor believed that Newell would not go out of her way to be of assistance to the Union and that she had a habit and practice of "hyper-technical" reading and misreading of information requests undermines the force of the Government's case. If Textor had such beliefs, as is clear, why not make his information requests specific and all encompassing? If he expected Newell would attempt to thwart him, why provide such an easy mark in first submitting an arguably ambiguous request and thereafter simply reiterating it rather than being clearer the first time and yet clearer still in the repeat request?

In that setting, as in all settings, it remains necessary to look to the entire context to determine the reasonableness of the parties action in light of the statute and the cases. Despite my relative lack of sympathy for Textor's draftsmanship in this instance, and keeping in mind that the Government bears the burden of establishing a violation of the Respondent's duties, I find the Newell responses untimely, inadequate and in violation of the Act.

First, Newell's initial response was some 40 days after the initial request. That is an unreasonably long period and is not excused by the described backlog generated by the press of business resulting from being out of town for a fortnight or based on workload generally. See my consideration of the Respondent's general workload arguments elsewhere in this decision. Second, while skilled counsel has marshaled the best argument possible for the seeming election to disclose to the Teamsters the Respondent's "criteria" rather than disclose the requested documents, it is unsustainable given the entire record herein, the obstructionist pattern and practice habits of Newell and the subsequent position of Newell.

⁴⁹ This is a simple error and is in fact a reference to the April 15 letter. There is no April 16 document in the record.

In agreement with the General Counsel and the Respondent and following the teachings of the cited cases to look to the entire setting and circumstances, I reject the argument that it was reasonable to read the information request as simply calling for documents or criteria—the Respondent's choice. Further, although Newell testified that there were no documents to be disclosed and her letter of August 12, 1996, asserts she had "stated previously" that no disclosable documents existed, there is no record evidence that she ever informed the Union of that fact before the August 12 letter. Finally the detailed explication in the August 12 letter of the rationale for the action the Respondent—months after the information request and its reiteration, stands in contrast to the initial reason given: "[I]t would be more efficient to eliminate that slot."

Given all the above, and based on the record and my evaluation of the demeanor of the witnesses, I find that the Respondent did not respond to the information request alleged in complaint subparagraph 65(a)(vi) in a timely or complete manner, but rather acted unreasonably and withheld a complete reply. Accordingly, I find the Respondent violated Section 8(a)(5) and (1) as alleged in the complaint.

(7) The Harold Scheck grievance—Complaint subparagraph 65(a)(vii)

Represented employee Harold Scheck filed a grievance dated March 4, 1996, asserting he was working fewer hours than junior employees. Textor forwarded the grievance to Yost by letter dated March 7, 1996. The letter contained an information request:

Additionally, please forward to me copies of the payroll records and workweek schedules for the workweek ending February 24, 1996, for all dayshift warehouse employees. Please forward this information by Friday, April 5, 1996.

It also asserted: "The provisions of the labor Agreement violated are contained in, but are not limited to, Articles 1, 2, 3, 23, 26, and Appendix A."

Newell responded by letter of March 25, 1996, denying the grievance. She stated:

We received the grievance you filed on behalf of Mr. Scheck in which he alleges less senior employees received more hours than he did the week ending February 24, 1996. Please state specifically how Albertson's violated Articles 1, 2, 3, 23, 26, and Appendix A.

As you know, the collective bargaining agreement does not require Albertson's to schedule employees by seniority. Albertson's takes seniority into consideration to the extent possible in scheduling employees.

The letter made no reference to the information request nor did it include the requested information. Textor responded by letter of March 29, 1996, appealing the denial of the grievance to arbitration and renewing his information request of March 7, 1996

Newell responded by letter dated April 6, 1996, which stated:

In a letter dated March 25, 1996 I requested that you state specifically how Albertson's violated Articles 1, 2, 3,

23, 26 and Appendix A as well as the names of the less senior employees who allegedly received more hours than did Mr. Scheck the week ending February 24, 1996. In a letter dated March 29, 1996, you appealed the grievance to arbitration

I still cannot research or respond to the grievance. Please provide the requested information by April 26,

No reference to the information request was contained in the letter, no documents were provided. The charge was filed on April 25, 1996.

In her August 12, 1996 summary letter, Newell states she is enclosing payroll records for all employees in the perishables department for the week ending February 24, 1996, and perishable day-shift-work schedules for the week ending February 24, 1996. She also states:

The practice at the Denver Distribution Center at the end of the shift is to let employees finish the orders they started. Arbitrator Robert Allen stated in his February 1993, decision that end of shift overtime is not predictable and that the union and company agreed a junior employee who is working on a job does not have to be removed to simply provide an overtime opportunity to a senior employee.

The document submitted into evidence did not contain its attachments or enclosures.

Textor testified Newell's August 12, 1996 letter contained payroll records for the perishable department, but not schedules. Newell initially recalled sending just the payroll records, but refreshed by the letter recalled that she also sent the work schedules.

The General Counsel and the Teamsters argue that this sequence of events well illustrates the illegal obduracy of Newell in simply refusing to supply information to the Teamsters. Thus she peppers the union with false statements of lack of understanding, does not initially even acknowledge the information requests and, even after unfair labor practices are filed and she is directed by her superior to send the information, believes she is not obligated by law to do so. Further they argue she frequently falsely states facts such as her contention in her letter of April 6, 1996, wherein she states:

In a letter dated March 25, 1996 I requested that you state specifically how Albertson's violated Articles 1, 2, 3, 23, 26 and Appendix A as well as the names of the less senior employees who allegedly received more hours than did Mr. Scheck the week ending February 24, 1996.

Thus they point out that Newell's March 26, 1996 letter never asked for the names of less senior employees who received more hours. And they argue that Newell falsely claimed to have included schedules with her letter of August 12, 1996.

Counsel for the Teamsters notes that the Newell's charade of repeatedly asking for and quibbling with the particulars of the Union's case as some sort self determined threshold for considering the grievance and associated information requests has no basis in law. He cites *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 38 (1981), for the proposition that the union is not obligated to cite specific contract provisions in order to show

the relevance of requested information. He emphasizes the Board's statement in *Doubarn Sheet Metal*, 243 NLRB 821, 824 (1979):

It is not necessary, as Respondent appears to suggest, that the Union demonstrate actual instances of contractual violations before Respondent must supply information. Indeed, if the Union had sufficient information to prove the contractual violations, it would not need to request information from Respondent.

The Respondent argues that the Teamster's information request was overboard, that the Union failed to respond to the Respondent's legitimate requests for clarification and that any delays that occurred in the provision of information did not prejudice the Union.

I agree with the arguments of the General Counsel and the Teamsters and reject the asserted defenses of the Respondent here. Based on Textor's testimony that he wanted to determine if other employees had been involved in cross duty tasks, I find that the request for information was not overbroad. Even if it were, the Respondent did not make that claim to the Union and by simply ignoring the information request waived such claims. In this regard I do not find that Newell's questioning of the Union respecting their contractual claims was related to such a narrowing intent or desire. Rather, in agreement with the Teamsters I find Newell's obfuscation was rather simply designed to thwart and delay the information provision process.

Respecting the issue of whether or not the information respecting schedules was submitted by Newell with her August 12, 1996 letter, I credit Textor over Newell. It is at the very least clear as the General Counsel and the Teamsters argue that Newell does not take care to be factually accurate in her letters. The fact that she asserted in the August letter that it included the disputed information is thus properly discounted. Further, Textor testified credibly and with a persuasive demeanor respecting his assertion that Newell's transmission did not contain the information and Newell initially testified she did not send the schedules only to change her testimony under questioning by her counsel.

Given all the above, I find that the Respondent through Newell willfully failed and refused to provide the requested payroll information until August 1996 and never provided the requested schedules in violation of Section 8(a)(5) and (1) of the Act. The General Counsel's complaint subparagraph is therefore sustained.

(8) The Ralph Beaver grievance of March 6, 1996— Complaint subparagraph 65(a)(viii)

On March 6, 1996, employee and Teamsters job steward Ralph Beaver filed a grievance alleging that he was disciplined for improperly taking a break when he was putting a lock on his locker after cutting off a lock earlier. He sought by way of remedy to have the discipline pulled from his file. Textor sent the grievance to Yost by letter dated March 8, 1996, which contained a request for: "all witness statement, supervisor reports, and an other documents or criteria upon which the company believes it had cause to discipline Mr. Beaver."

The matter was assigned to Newell. She sent an April 1, 1996 memo to Jack Gagnor at the distribution center seeking information on various grievances including the Beaver grievance quoting, essentially verbatim, from the information requests made and asking for the requested information to be provided her in 3 days.

Newell responded to Textor by letter dated April 8, 1996, asking for "more details of exactly what Mr. Beaver is grieving. Also state specifically how Albertson's violated Articles 1, 2, and 24 of the current collective-bargaining agreement." The letter did not acknowledge the information request, address it, or provide either documents or a statement that no documents existed.

Textor testified that upon receiving this letter he contacted Beaver to obtain details of the events and then called Newell. He testified:

To the best of memory I said that, I had information regarding the grievance, the March 6, 1996 grievance of Ralph Beaver, she said that it was a stupid grievance and waste of her time. She went on to say, I don't understand why the Union would grieve a written warning. . . . After she said that it was a stupid grievance and a waste of her time, I said employees work records were important to them. She said that it was a grievance and a waste of her time, and why would the union want to grieve a written warning.

So I said, employees can be terminated after receiving one written warning, so it is important, that is what the contract says. So she said that—she basically said that I didn't know what the contract said, we got into a discussion about the substance of the contract, and I told her that I thought it was funny that she would be saying that I didn't know what the contract says as she had never been in any of the negotiations. She told me that she had been in—excuse me that I had only been in two of the negotiations that she had checked notes, she had told me that I was a liar and she hung up.

Newell testified to the same conversation:

I believe that it was sometime during the middle of April or toward the end of April, I think, actually, that he called and we were talking about the written warning. It ended up being written warning that Mr. Beaver was grieving.

- Q. As best as you can, can you relate for us what Mr. Textor said in connection with the Beaver grievance in that conversation?
- A. I believe he said that Mr. Beaver should not have gotten a written warning and that other people hadn't gotten written warnings.
 - Q. What, if anything, did you say in response to that?
- A. Written warnings are for corrective action and I think I said that it was a frivolous grievance or it didn't have any merit.
- Q. Did you say anything else to Mr. Textor at that time about the Beaver grievance?
- A. I think I had checked our files or had our Human Resources person check our files and we couldn't find a written warning in the file.

- Q. Did you make any request of Mr. Textor in that telephone conversation with respect to the Beaver grievance?
- A. Yes, I did. I asked him if he would put the Union—Now that we knew it was a written warning, if he would put that in writing to me.
- Q. What did Mr. Textor say? Did he say anything in response?
- A. He said something about he didn't want to get into a letter writing campaign.
- Q. Did you understand from his response whether he was going to put it in writing?
- A. I think not. I think he was not going to put it in writing because he didn't want to start a letter writing campaign.
- Q. Why did you ask Mr. Textor to put his explanation in writing?
- A. My experience . . . My experience with Mr. Textor in the past was even though I thought I heard what he said to me and I thought he heard what I said to him, later, there would be disagreements between what was said and what was not said, so I was just asking him to put it in writing so I had a record of what happened.
- Q. BY MR. APPEL: At any time during this conversation, did you call Mr. Textor a liar?

A. No.

- Q. Did you refer to the Beaver grievance as "stupid?"
- A. No.
- Q. Do you recall how the telephone conversation ended?
- A. I believe I told Mr. Textor I was hanging up now and I hung up.

Textor appealed the grievance to arbitration by letter April 17, 1996, and in it renewed his information request of March 8. The charge was filed on April 25, 1996. Newell responded to Textor's April 17 letter on April 26, 1996:

In my April 8, 1996, response to the grievance you filed on Mr. Beaver's behalf, I requested that you provide details of exactly what Mr. Beaver was grieving as well as that in compliance with Article 18, Grievance and Arbitration, you state the "explicit provisions" Albertson's allegedly violated. Your March 8, 1996 letter merely states: "The provisions of the labor Agreement violated are contained in, but are not limited to, Articles 1, 2, and 24. On April 17, 1996, you sent me your standard form letter, appealing the grievance to arbitration and demanding information. I still am unable to respond to your demands because you failed to provide the information I requested.

On July 8, 1996, Textor wrote to Newell respecting the March 6, 1996 Beaver grievance, giving details as he understood them, arguing his case and concluding: "The Union requests that the February 22, 1996 warning be expunged."

Newell testified that she, after her mid-April phone call with Textor, although she did not recall the date, she called Brenda Folk, the head of human resources at the distribution center and was told there was no warning letter in Beaver's file. Newell in her August 12, 1996 summary of information cases includes the following entry:

Ralph Beaver 3/6/96: Mr. Beaver's personnel [sic] does not contain any such written warning. Accordingly, there are no documents responsive to your request.

Textor replied by letter dated September 3 stating:

Based upon the content of your August 12, 1996 letter, in which the company states that "Mr. Beaver's personnel filed does not contain any such written warning, "the Union will withdraw the grievance.

Sometime thereafter Newell was informed by the distribution center that they had discovered the Beaver warning letter and that it had apparently been misfiled. Newell testified she told them to discard the document and that she had not informed the Union of either the belated discovery of the document or of its removal/destruction.

The General Counsel and the Teamsters argue that these events are simply more of the same process of Newell's obduracy, quibbling, rudeness and discourtesy, fraudulent refusals to understand, and the insistence on resource wasting requirements of the Teamsters—all to justify refusal to provide information. Only after the filing of an unfair labor practice charge, and instruction by her superior to comply, they argue, does Newell provide, finally, late and begrudging provision of information—in this case incorrect information a fact thereafter concealed by subsequent fraud and destruction of documents.

The Respondent argues:

[U]nder the totality of the circumstances including the filing of an unclear grievance, reasonable delay caused by obtaining clarification of the grievance, and the good faith albeit mistaken, belief that no discipline had been meted out, Albertson's completed with the union's request for information in a timely and non-prejudicial manner. (The Respondents brief, complaint par. 65 at 106.)

This complaint subparagraph deals with a request for information concerning the Respondent's discipline of the grievant, but deals with the confusion respecting whether or not discipline was actually issued and whether Newell behaved reasonably under all the circumstances.

Beaver, the grievant, correctly believed a written warning had been issued to him and sought in his grievance to have the warning "pulled from my file." Newell received the grievance and Textor's March 8, 1996 cover letter seeking information regarding the Respondent's "cause to discipline Mr. Beaver." Newell responded a full month later seeking more details of the matter grieved and seeking the Union's contractual theory of violation.

That delay is unreasonable. Newell testified to the press of business, but as discussed, supra, that is not a defense when the Respondent has not established how its resources are dedicated to the information provision tasks. While Beaver's language is inartful, it is clear and I find that Newell could and should have discerned from the grievance and cover letter that the grievance alleged that written discipline had been issued to Beaver for improperly being on break in the locker room. As she did later,

Newell could have contacted the distribution center and passed on their information to Textor.

It is unreasonable and unjustified to delay the provision of information respecting a grievance because the union has not satisfied the employers desire or even a contractual requirement for specific contractual citations supporting the alleged violation. It is never reasonable to refuse to understand that which is reasonably understandable as a means of delaying provision of information

There is a dispute in the testimony of Textor and Newell concerning the specifics of the April 16 phone conversation. I credit Textor in full discrediting Newell where the two differ. Textor's demeanor was far superior to Newell's respecting this conversation. Her version was incomplete and dealt more often with general denials whereas Textor had a strong and clear recollection of specifics. The fact that Newell belittled Textor, Beaver and the Teamsters respecting the grieving of a written warning is not an unfair labor practice. Union officials are not employees subject to the protection of the Act and the conversation is not alleged to violate Section 8(a)(1) of the Act. Newell's remarks, however, strongly support the argument of the government and the Union that Newell was fundamentally unsympathetic to the grievance process, and, at best, doubtful and reluctant respecting provision of requested information to the Union regarding grievances.

The conversation further put Newell on notice that the grievance concerned a written warning. While the date is not clear when Newell thereafter was told that no written warning was in Beaver's file, it is clear that she did not notify the Union of that fact until August. Whether she delayed calling the distribution center or delayed notifying the Union after having done so, or both, the sum passage of time between the April phone call and the August disclosure to the Union that no discipline existed was grossly unreasonable and tantamount to a refusal to provide information rather than simple delay. This behavior—even in the face of the unfair labor practice charge—clearly violates the Respondent's duty to provide information under the statute.

The Respondent argues no prejudice arises in a delay in the provision of information as occurred herein. I strongly disagree. A labor organization must evaluate the merits of a grievance from the time of its filing to its conclusion. It must devote time and resources to investigation, prosecution, and possible settlement of grievances. Putting a case on an arbitration track not only takes the additional time and resources needed to prepare the case for arbitration but delays other cases in the arbitration queue and necessarily dilutes the time which may devoted to other cases. The General Counsel has argued vociferously in this case that the Respondent's desire to delay and protract the information process had as one goal and result the increased expenditure of labor organization resources and the reduced success of the Union's use of the grievance process. Newell's constant insistence on written responses from Textor, even requiring that he confirm in writing what he had iust told her by telephone, seemingly supports this argument and the other conduct found herein.

The unusual sequence of events in this matter: that in August the Union was mistakenly told no disciplinary document

existed, in September the Union withdrew the grievance based on that factual representation and, thereafter, the Respondent discovered the "non-existent document" i.e., the warning and, destroyed it without ever notifying the Union of its existence, merits discussion.

I found a violation of Section 8(a)(5) and (1) of the Act because Newell took from March to August 1996 to inform the Teamsters of her information that no disciplinary document existed. The violation turned on the inadequacy of the Respondent's excuses and explanations for delay not on the fact that the information conveyed on August 12 was incorrect.

I here find a further violation of the Respondent's duty to bargain in good faith once the document had been discovered. That violation is manifested in Newell's instruction to the distribution center to destroy the document and in her refusal to inform the Union of the discovery of and existence of the document. Once the document had been discovered and its discovery reported to Newell, I find she was obligated to notify Textor that the document had been found and—if it remained management's decision—would be discarded by the Respondent

Why is the Respondent's refusal to "come clean" to the Union about its postgrievance discovery that its earlier report was in error a further violation of the Act? Alternatively, to put it in terms of the Respondent's argument on brief, why was the Respondent's failure to do so prejudicial to the Teamsters? Because the Union had been given information that, even if given in good faith at the time of its report, had been discovered by the Respondent to have been false. ⁵⁰ But was not the time of the discovery so far after the grievance had been resolved as to be moot? No.

Beaver was a shop steward for the Union who had responsibilities for grievances at least in the initial steps. Both his and the Union's credibility among employees could well have been undermined by the conclusions to be drawn from the false information the Respondent gave that the warning never existed. What kind of union and union steward does not even know if a written warning had issued or not? So, too the confidence the Union had in Beaver and Beaver's own confidence was surely undermined by the asserted fact that no warning existed when Beaver has grieved the issuance of such a warning.

The Respondent's false report therefore harmed the Union. If the report was knowingly false the Act was violated. If the mistake was innocent, the failure to correct the error by reporting the facts to the Union was a violation. This is especially true where, as here, the failure to correct the mistaken information is at the tail end of a long period of wrongful failure and refusal to meet the obligations of the Act regarding disclosure.

Based on all the above and the record as a whole including the demeanor of Textor and Newell, I find the General Counsel has sustained the allegations of complaint subparagraph

⁵⁰ Were I necessary to do so, I would find that the Respondent's purported good-faith belief that the document did not exist was not based on a good-faith investigation of the grievance and therefore cannot in fact or law constitute a benign or innocent belief. Any proper investigation of the grievance would necessarily have involved talking to the author of the warning who would have confirmed the existence of the warning as its author.

65(a)(viii) and that the Respondent respecting that information request has violated Section 8(a)(5) and (1) of the Act.

(9) The Mike Cummins grievance—Complaint subparagraph 65(a)(ix)

Employee Mike Cummins filed a grievance on March 15, 1996, asserting he was assessed 1-1/2 points—an adverse action⁵¹—under the Respondent's attendance policy for an absence associated with an on the job injury. Textor transmitted the grievance to Yost under a cover letter dated March 19, 1996. The letter sought: "copies of all documents or any other criteria upon which the company believes it has cause to discipline Mr. Cummins."

The matter was given to Newell who referred on the information request to the distribution center by memo of April 1, 1996, instructing them to provide her the information no later than April 4, 1996. Newell learned from the distribution center that Cummins had not in fact been assessed points. On April 15, 1996, Newell wrote Textor acknowledging the grievance and asking Textor to call her. No further information was given. Textor on April 17, 1996, appealed the grievance to arbitration and noted that the Respondent has not provided the requested information. Newell in turn responded by letter dated April 26, 1996, with the following complete text:

In my April 15, 1996, response to Mr. Cummins' March 15, 1996 grievance, I asked you to call me so that we would discuss the grievance. Your response was to send me a form letter, appealing the grievance to arbitration and requesting information. If you would like to discuss a resolution to Mr. Cummins' grievance, please call me at [telephone number omitted].

The charge was filed on April 25, 1996. Newell testified that on or about July 21, 1996, she spoke with Textor and for the first time informed him that Cummins has received no attendance points. She thereafter wrote Textor on July 22, 1966, confirming that Cummins had not been assessed points since his absence was related to an on the job injury and soliciting a withdrawal of the grievance. Thereafter, on August 5, 1996, by letter the Teamsters in fact withdrew the grievance.

The General Counsel and the Teamsters emphasize that the conduct of Newell is a continuation of her pattern of obduracy and deceit. She well knew in early April 1996 that the grievance was based on a mistaken premise that points had been assessed to Cummins and until July—4 months—kept that fact from the Union and failed to provide the information requested in April. The fact that Newell in her written correspondence asked that Textor call her, argues the counsel for the Teamsters, reveals the inherent bad faith of her approach to the Union. He points out that Newell has testified that she did not like to speak on the phone with Textor and preferred to deal in writing. She regularly asked Textor to confirm assertions made on the telephone in writing. She testified that she was busy and had little office time. Yet rather than end the entire matter in April by simply putting in the letter she sent Textor that no assessment

of points had taken place, she deliberately drew out the matter and even in that setting and circumstance neither provided the information nor even referred to the information request.

The General Counsel and the Teamsters argue that this course of conduct, surely known to Newell's superiors, is nakedly violative and gives the lie to any assertions that the Respondent was acting in good faith in its dealings with information requests. Further, it clearly shows that the Respondent was not short of time to devote to obfuscation and delay.

The Respondent argues that the delay was "attributable to the unions unreasonable refusal to respond to Albertson's repeated requests to discuss resolution of the grievance." (R. Br., complaint par. 65 at 118.)

Perhaps in other situations between other individuals, the conduct of Newell respecting the Cummins grievance would be reasonable. On this record however, I reject the Respondent's defense and agree with the Government and the Union. Newell and Textor has a strained relationship. By her own testimony, Newell's telephone communications with Textor were often unsuccessful. The entire context of Newell's dealings with Textor leads to the clear conclusion, which finding I explicitly make, that Newell's conduct was informed by animus and bad faith. I find she withheld the information that there had been no point assessment from Textor from April to July, if not out of spite or meanness, then to make his work more difficult and time consuming and to undermine employee support for Textor either as an individual or as an official of the Teamsters.

In reaching this conclusion, I find that Newell's sending two dodging letters which, although they seemingly solicit a telephone call from Textor, were not intended either to conserve her own strained resources at a busy time or to contribute to a speedy or amicable resolution of the matter. Rather I find her conduct was designed to do just what it in fact did, delay the resolution of the grievance and occupy unnecessarily the time of the Union and Textor. The entire picture of the relationship of Textor and Newell at this period, as is discussed throughout the analysis of complaint paragraph 65, is such that the likelihood of Textor initiating a phone call to Newell under the circumstances as is apparently innocently suggested in Newell's initial letter was well known by Newell to be very unlikely. She could have telephoned Textor or left a message with the critical fact that no points had been assessed. She could have simply put the simple fact that no points had been assigned in her letter. She could have provided the information requested. She did not do any of these things for, I find, malign motives and in so doing violated the Act as alleged in the complaint.

(10) Swing shift grievance—Complaint subparagraph 65(a)(x)

On March 25, 1996, a group of several dozen swing shift employees signed a grievance alleging:

Employer is giving days off and weekly schedules in a random and haphazard manner. We are being given no consideration at all for either our seniority or company past practices for the specific shifts that exist.

The grievance asked for the "Employer to go by seniority in awarding specific shifts."

⁵¹ While no adverse action is taken against an employee for receiving points as such, when the points accumulate to certain levels, discipline does take place.

By letter dated March 29, 1996, Textor transmitted the grievance to Yost and added:

Additionally, please forward to me a description and documentation of all relevant business reasons which the company believes substantiates its position to arbitrarily assign any employee to any specific shift it chooses.

The provisions of the labor Agreement violated are contained in, but are not limited to, Articles 1, 2, 3, 23, and 26.

Textor testified that the Teamster's had a long series of disputes with the Respondent respecting the application of seniority in assignments and knew from the history of the dispute that the Respondent might well assert business reasons for taking actions or making assignments independent of seniority.

On April 1, 1996, Newell requested the information from Gagnor in the distribution center in essentially the same terms Textor used in his request and asked for the information by April 4. She discussed the grievance with Gagnon on April 4. Notes of the meeting indicate they "discussed the fact that days off were not being assigned by seniority (nothing in the contract required it)."

On April 15, 1996, Newell responded to Textor acknowledging receipt of the grievance and asked, "[H]ow Albertson's violated Articles 1, 2, 3, 23 and 26 of the current agreement." The letter did not mention or respond to the information request. The charge was filed on April 25, 1996.

Textor by letter dated April 17, 1996, appealed the grievance to arbitration and noted that the Respondent had not provided the information requested in Textor's letter of March 29, 1996. The charge was filed on April 25, 1996. On April 26, 1996, Newell wrote Textor telling him she had earlier asked for an explanation of how the Respondent had violated the contract articles cited by him and had not received a reply. She stated: "I still cannot respond to this grievance until I know exactly what you are grieving and the provision(s) Albertson's allegedly violated." Newell again did not mention or reply to the information request.

In her August 12, 1996 summary response, Newell reviewed the correspondence and asked for the names of employees who submitted a request for a specific shift assignment and the details concerning the failure of the Respondent to abide by the contract. She added: "In the event you provide this information, I will investigate and provide you with all relevant and legally required documents and information."

Newell testified she later learned there were no documents to be disclosed but that she did not know this to be so before her August 12, 1996 letter. She testified she did not understand the grievance since assignment to swing shift was one matter and selection for a day off another. She added that the information requested could not be supplied without such understanding.

[T]here are two different things. There is a contractual provision that explains how employees can request a certain shift. There is nothing in the contract about requesting days off or anything like that. So, if I don't understand what he is grieving, how can I explain what we have done or what factors were based on it if I don't even know what he is talking about.

The General Counsel argues that Newell is here repeating her technique of feigning a lack of understanding of the grievance, which she believed allowed her to simply ignore let alone not supply the information requested. They argue she well knew the theory of the Teamsters. They note she requested the information the Union wanted from the distribution center that the Teamsters wanted and discussed with Gagnon the specific claim of the grievance the Union wanted seniority for the assignment of days off. They note further her technique of determining that if the Respondent in its wisdom did not believe the contract required what they union sought, no information was to be supplied. And if no documents existed, that fact as well was to be kept from the union to obfuscate, delay and increase the costs of contract administration for the Union and undermine its support from employees.

The Respondent argues that any delay resulted from the Union's failure to clarify the request by explaining the grievance as requested by Newell. The Respondent further argues no prejudice resulted.

Based on the record as a whole, more particularly on the substantial record of Newell's approach to grievances and information requests, and her demeanor during her testimony, I find that as the General Counsel and the Teamsters argue, Newell had a sufficient understanding of the grievance to request in early April from the distribution center the precise information requested by the Union. She could have supplied the information requested or could have informed the Teamsters that the information did not exist. Indeed I specifically find based on her request of the information and the notes of her conversation with Gagnon, that she had sufficient understanding to discuss the matter with management and therefore had sufficient information to understand and deal with the matter in her communications with the Union. In other words I find that Newell was simply prevaricating when she claimed a lack of understanding to the Union.

The "no prejudice" argument of the Respondent has been considered and rejected supra and need not be repeated here save to add that where, as I find here for the multimonth period involved, the delay is deliberate and part of a repeated pattern of deception and delay, the argument lacks even colorable merit.

The second part of the Respondent's defense bears further review. It simply does not matter if a labor organization's grievance is perceived as nonmeritorious or if the union's theory of a contract violation is murky or even ambiguous. A request for information while connected to a grievance in the instances involved herein, is not purely related to that portion of a collective-bargaining agreement. Conceptually, the duty to produce information relates to the labor organization's need for information to fulfill its duty to represent the employees. Where as here the information request was clear, the obligation was to disclose it even if the Teamsters had not made their theory of a contract violation clear. Further in this instance, I have found that the "failure to understand" protestations of Newell were not sincere or in good faith but were rather a deception and device advanced in bad faith in an attempt to avoid the Respondent's obligation to provide the information. Thus the conduct was part of a pattern of wrongful conduct designed

in this instance to delay and complicate the Union's handling of the grievance.

Accordingly, based on all the above, I find that the Respondent deliberately feigned lack of understanding of the grievance and delayed production of the requested information in violation of Section 8(a)(5) and (1) of the Act as alleged in subparagraph 65(a)(x) of the complaint.

(11) The April 3 and 25, 1996 Beaver grievance— Complaint subparagraph 65(a)(xi)

On April 1, 1996, Ralph Beaver filed a grievance which alleged:

Came back to work from a work related injury for 4 hours of full duty. Albertson's would not give me back my forklift drivers job. Which is a bid job. Instead they are asking me [to] select grocery orders.

Textor forwarded the grievance to Yost on April 3, 1996, with a request:

Additionally, please forward to me copies of the relevant business factors, or any other criteria upon which the company has based its decision to assign a less senior employee to the forklift position Mr. Beaver has held for several years. (Mr. Beaver submitted a written request for this position and was awarded the position as the senior employee).

Newell responded by letter of April 22, 1996, asking how the contract was violated, asserting: "As you are well aware, there are no 'bid' jobs in the Denver warehouse." The letter did not mention, address or respond to the information request. Newell testified that her letter met the request because it informed the Union "the criteria upon which we based our decision."

On April 25, 1996, Textor appealed the grievance denial to arbitration and noted the information request had not been satisfied. The charge was filed that same day. The grievance was resolved and withdrawn in July 1996, without any information having been supplied.

The General Counsel and the Teamsters repeat their argument that Newell's position that she could refuse to process grievances and ignore and refuse to acknowledge or refuse to answer information requests until the Union satisfied her stubborn and unwilling notions of a clear explanation on how the Respondent had violated the contract are either a sham and subterfuge offered as a device to defeat and diminish the Union or are an unreasonable and illegal posture taken repeatedly on this record. In either event the Act was violated. The Respondent too, repeats its earlier arguments that it was faced with an election: supply criteria or records and that Newell's letter timely provided the Respondent's criteria.

As discussed in earlier Newell/Textor allegations, supra, the Respondent's argument is without merit. Newell's repeated ignoring of the Union's information requests cannot be justified.. As found supra, the Respondent through Newell utilizing her offense is the best defense approach did not reasonably respond to the Union's request for relevant information. Therefore I find that the Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

(12) The Tony Fleming grievance—Complaint subparagraph 65(a)(xii)

Employee Tony Fleming returned to work from an on the job injury and was assigned as an order selector and not returned to forklift operation. He grieved this action. On April 5, 1996, Textor transmitted the grievance to Yost with an information request for:

[T]he relevant business factors, or any other reason or criteria upon which the company based its decision to assign an employee other than Mr. Fleming to the position Mr. Fleming had prior to being injured.

Newell replied by letter dated April 26, 1996, much as she had in the Beaver II grievance, supra, denying that bid jobs existed in the warehouse, stating that Fleming was performing the same job he had when he was injured and that his pay was the same. The information request was not referred to and the letter contained no disclosures. Newell testified that this response provided the relevant business factors and there were no documents to provide. She confirmed that she had not told the Union that no documents existed.

The parties reprise the arguments made supra, I reach the same result. The only response, the April 26, 1996 letter is not in fact a good-faith effort to supply any information at all let alone the information requested. This is sufficient to sustain the violation as alleged. Further, however, I reject the testimony of Newell that she believed her response in fact responded to the request in a meaningful manner. Her repeated pattern is to divulge nothing if the information request was not consistent with her view of the grievance. Thus, I find that she rejected the Union's claim and theory of a violation and thereafter simply declined be responsive to the Union. Indeed, consistent with her pattern as disclosed in the allegations above, she did not deign to mention the information request or assert that there were no documents responsive to the request. Such deliberate withholding remains a violation of the Act as previously found.

(13) The Pete Therkildsen grievance—Complaint subparagraph 65(a)(xiii)

Textor sent Yost a grievance on April 10, 1996, grieving the termination of employee Pete Therkildsen as not for just cause. The cover letter requested, "copies of any and all documents or any other criteria upon which the company believes it had cause to terminate Mr. Therkildsen."

On April 22, 1996, Newell wrote Textor responding to the grievance. She asked for a specific explanation of how the Respondent violated the parties agreements. The letter also noted:

Mr. Therkildsen's employment was terminated because he violated Albertson's policies and federal D. O. T. regulations when he reported to work and continued to work while "under the effects of alcohol."

The letter did not refer to the information request nor enclose any documents.

Textor by letter of April 25, 1996, appealed the grievance to arbitration. That same day the charge was filed. On May 10, 1996, Textor sent another appeal letter to the Respondent add-

ing that the Respondent had not provided the information requested. Thereafter, but before August 12, 1996, Textor testified thereafter he received but a single document from the Respondent: the Respondent's department of transportation (DOT) drug and alcohol testing procedures which he had not requested nor, he testified, found relevant.

Newell provided along with her letter of August 12, 1996, a substantial and detailed narrative report of the events associated with the discharge, statements of the grievant and a law enforcement official, a DOT citation and associated notes, and management officials' notes.

She testified her letter of April 22, 1996, was a complete response to the information request and that her August 12, 1996 submission was only undertaken under instructions from her superior.

The arguments of the parties are but a reprise of those discussed in my complaint subparagraph 65(a) findings, supra. I reach the same conclusion. The Respondent's April response was inadequate and was made in bad faith. I find Newell did not reasonably believe and in fact did not believe at all that she was responding to the alternative "criteria" portion of the information request, but was rather simply stonewalling the Union. I sustain the allegation. The Respondent in not providing the requested information until August violated Section 8(a)(5) and (1) of the Act.

E. Noninformation Cases

1. Local 8—Complaint subparagraphs 5(b), (c), and (e)

a. Facts

Complaint subparagraphs 5(b), (c), and (e) assert:

- (b) On about July 25, 1996, Respondent, by Bob Agostinelli at Respondent's Store # 211, in Great Falls, Montana:
 - (i) (subparagraph deleted);
- (ii) interrogated an employee about a discussion with said employee's union representative;
- (iii) impliedly threatened an employee with unspecified reprisals by telling such employee to lie to the Union and say that he spent less than ten per cent of his work time performing stocking duties.
- (c) On about July 30, 1996, Respondent by Bob Agostinelli at Respondent's Store # 211, in Great Falls, Montana:
 - (i) (subparagraph deleted);
 - (ii) (subparagraph deleted);
- (iii) stated to an employee that if such employee thought he was owed back pay, he should discuss it with Agostinelli, thereby bypassing UFCW 8, dealing directly with said employee and discouraging employees from engaging in union activities;
 - (iv) (subparagraph deleted);
 - (v) (subparagraph deleted);
 - (vi) (subparagraph deleted).
 - (d) (subparagraph deleted).
- (e) On or about specific dates in August, 1996, the exact dates being unknown to the Regional Director, but well

known to Respondent, Respondent, by Bob Agostinelli at Respondent's Store # 211, in Great Falls, Montana:

- (i) threatened that Respondent would discharge all courtesy clerks because the courtesy clerks had contacted LIECW 8.
- (ii) threatened to discharge an employee because that employee contacted UFCW 8;
 - (iii) (subparagraph deleted);
 - (iv) (subparagraph deleted);
- (v) told an employee that he (Agostinelli) would negotiate directly with such employee about potential back pay, thereby bypassing UFCW 8, dealing directly with said employee and discouraging said employee from engaging in union activities.

Robert Agostinelli was the store director of the Respondent's store #211 in Great Falls, Montana, during the 1990s. Local 8 represented certain of store #211's employees. Union Representative Sara Thody was assigned the store at relevant periods and regularly visited the store. In July 1996, the Union filed a grievance alleging that courtesy clerks were working an excessive number of hours in the helper clerk position—a better paid classification—without receiving appropriate recompense.

In July 1996, Thody visited the store and asked Agostinelli if she could speak to courtesy clerk Eric Bouche while he was "on the clock." The store manager gave permission so long as Bouche kept working. Thody spoke to Bouche in the rear of the store and in time Agostinelli came and directed Bouche inside to additional tasks.

Agostinelli testified at the hearing in January 2001, that he had no present recollection of many of the July and August 1996 events, but had signed a Board affidavit on October 7, 1996, and that the contents of the affidavit were honestly prepared and correctly reflected his memory of events at that time. He was asked to refresh his recollection using that document at trial respecting all the events discussed below and found he did not do so. The affidavit was placed in evidence without objection

The affidavit asserts:

I may have asked Eric [Bouche] the same day he talked to Sara Thody what Sara had wanted. Eric told me, "nothing" and that was the end of the conversation. Other than that I have never asked any other courtesy clerks what they talked to the union about. I never asked any employees if they had gone to the union.

Bouche did not testify.

Agostinelli recalled that on the same day he observed courtesy clerk Don Ellsworth talking to Thody in the store parking lot. Some time later as Agostinelli left to go to lunch he observed Thody and Ellsworth ending their conversation. As Ellsworth entered the store, he passed Agostinelli and they spoke briefly. Agostinelli recalled that he was upset with the duration of the conversation and asked Ellsworth: "[W]hat the hell was so important that he couldn't do carry-outs." Agostinelli testified he did not "presently recall" additional elements of the conversation. His affidavit contains further details:

Don [Ellsworth] said that Sara [Thody] said that if he went down and made statements for the union, the union would get him more pay. I then said that he'd probably get more money if he were non-union anyway.

Ellsworth did not testify.

Still in July 1996, Agostinelli had conversations with three courtesy clerks. He testified he did not recall the conversations and was not refreshed by reading his affidavit. His affidavit states:

After the union filed the grievance about courtesy clerks, I went to three courtesy clerks and told them that if they felt we owed them any money to come to me and let me know and I'd see if I could get it straightened out. I recall telling this to Eric Bouche, Sam Sienbenaller, and Joe McMillan. . . . My conversations with Eric, Sam and Joe were individual conversations

Eric Bouche, Sam Sienbenaller, and Joe McMillan did not testify.

Similarly, Agostinelli did not recall, but his affidavit asserts:

I told both Eric [Boucher] and Sam [Sienbenaller] that if they kept working in back [of the store] and if the union asked, they should tell the union they work less than 10% of their time in the back. I did not tell any courtesy clerks that if they wanted to keep working in the back not to tell the union about it. I told them that because I was beating my head against the wall trying to keep them up front.

Agostinelli during this same time had a conversation with Ronnie Harvie at that time employed as the fifth key person⁵² or night manager—a represented position—and now grocery manager, and Scott Koth then the grocery manager now a store manager. As with Agostinelli, Harvie had a failure of recollection respecting the specifics of the conversation but had given a Board affidavit on September 6, 1996. Although counsel attempted to refresh his recollection with the affidavit, he could not bring the conversation back to memory save as discussed below. He did generally acknowledge that the affidavit reflected his memory of events at the time and that it was true. The affidavit asserts:

Shortly after the Union contacted the store about this matter, Bob Agostinelli said that the courtesy clerks had been down to the union complaining about working as a helper clerk and ... are not being paid for it. The conversation arose in the grocery back room, and Scott Koth, the grocery manager, was also present. Bob Agostinelli said that . . . to solve the problem, he should get rid of all the courtesy clerks. I understood that to mean to be fire all the courtesy clerks.

Harvie testified that he could recall that Agostinelli was joking around at the time.

Agostinelli denied making the statement that he should get rid of the courtesy clerks. Koth denied that Bob Agostinelli had ever said that he should get rid of all courtesy clerks.

Harvie's affidavit relates a separate conversation he similarly could not recall:

About a month ago, Bob Agostinelli and I were in the back room. Eric Bouche[r] went by with a hand truck in his hand.... Bob said, "There goes another one of those crybabies that went to the Union. I just—I should just fire him.

Harvie did recall that Agostinelli was joking or "goofing around." Agostinelli denied making the statement.

b. Analysis and conclusions

(1) Complaint subparagraph 5(b)(ii)

Complaint subparagraph 5(b)(ii) alleges that Agostinelli interrogated an employee about a discussion with the employee's union representative. This allegation seems to cover two conversations.

Respecting the first, the unchallenged evidence as set forth in complete form above is that Agostinelli allowed a union official to talk with courtesy clerk employee Eric Bouche on company time, had occasion to end that conversation by sending the employee to work at a different area and thereafter "may have" asked the employee what the union representative had wanted, but in all events was told "nothing."

The threshold issue is whether or not the counsel for the General Counsel has met her burden of showing that Agostinelli in fact asked the employee the "may have" question. The General Counsel and the Union argue that the entire context shows that the employee was asked and answered as indicated. The Respondent argues that the evidence shows only the statement of Boucher and does not establish what he was asked or if he was asked anything at all. I agree with the Respondent that the affidavit—the sole evidence of this conversation—supports only the answer and does not allow a finding respecting whether the statement made was in response to a question phrased as a "may have" in the affidavit, some other question or no question at all. While it is true that the possibility that the question was asked is more likely a probability, it is the government that has the burden of proof and I find that in this case it was not met.

Given that threshold finding, the second issue is whether or not such a factual resolution supports a finding that the Act was violated. The General Counsel and the Union argue the conversation was classic interrogation by a management official at a time when the employees had gone to the Union respecting a grievance and the Union was on site investigating. The Respondent argues that the statement may have been volunteered and in such a situation no violation would have occurred. Again I agree with the Respondent. Thus, irrespective of my agreement with the Government that, if Agostinelli asked what the union official had wanted of the employees, the Act would have been violated, I have found the evidence does not support such a finding. As the Respondent asserts, if the employee had volunteered the information, no violation took place.

The second incident occurred on the same day. Agostinelli observed employee Ellsworth speaking to Thody for some period while, in Agostinelli's opinion, Ellsworth should have been helping customers. Agostinelli asked Ellsworth as he was returning to the store, "what the hell was so important that he

 $^{^{52}}$ That is he was one of the five employees who had keys to the store.

couldn't do carry-outs." He was answered by Ellsworth's report that the Union was investigating the grievance and, if Ellwsorth would make a statement to the Union, he might get more money. Agostinelli answered that Ellsworth would "probably get more money if he were non-union anyway."

I do not find that Agostinelli engaged in wrongful surveillance of Ellsworth in this situation. There is no basis to find that Agostinelli was watching him because of his speaking to Thody and the conversation occurred while Ellsworth was working. Agostinelli's statement: "what the hell was so important that he couldn't do carry-outs," is not in my view a clear question seeking the content of the union official's statements to Ellsworth so much as a gruff challenge to Ellsworth to explain why he had not been working. Thus, I do not find the comment rises to the level of an interrogation. I therefore find neither wrongful surveillance nor interrogation in this conduct.

Agostinelli's second statement: that Ellsworth would "probably get more money if he were non-union anyway" is an implied promise of benefit conditioned on the employee abandoning support for the Union. It would clearly violate the Act if alleged as a violation.

I am not confident that the General Counsel offered this evidence in support of this subparagraph of the complaint or any other paragraph of the complaint as opposed to simply offered as support for her credibility arguments and as general background. There is no current allegation that an employee was promised increased benefits for rejecting union representation. In all events, the statement is not improper surveillance or interrogation.

It may be argued that the matter was fully litigated and therefore the conduct may be found to violate the Act even if a complaint allegation does not precisely encompass it. There is substantial Board and court authority for finding fully litigated matters violations of the Act despite less than clear complaint support for their particulars. Here, however, the General Counsel alleged at complaint subparagraph 5(d)(ii) an allegation the Respondent wrongfully promised employees more money as nonunion employees. That complaint paragraph was thereafter withdrawn. Given the specific withdrawal of that complaint paragraph, I find it would be inappropriate to simply find a violation respecting this statement based on the fact that it was fully litigated. I shall therefore dismiss this complaint allegation in its entirety.

(2) Complaint subparagraph 5(b)(iii)

Complaint subparagraph 5(b)(iii) alleges that Agostinelli impliedly threatened an employee with unspecified reprisals by telling such employee to lie to the Union and say that he spent less than 10 percent of his worktime performing stocking duties. The uncontested evidence was that Agostinelli told employees: "[I]f the union asked, they should tell the union they work less than 10% of their time in the back."

The General Counsel and the Charging Party emphasize that at the time of this conversation it was clear to Agostinelli and the courtesy clerks who received the instructions under consideration that the Union was investigating a grievance that was based in important part on how much time the courtesy clerks were working in various places and in various tasks. They

argue that the instruction to the employees to answer any union question about the amount of time they worked in the back was an instruction to lie backed by an implied threat.

The Respondent argues that the record shows that Agostinelli had attempted to keep the courtesy clerks working "in the front" and the General Counsel failed to show that the two individuals believed that they worked in the back more than 10 percent of the time. The Respondent argues from these propositions that the "instructions to the courtesy clerks were not that they should work in the back and lie about it to Local 8, but rather that they should not work in the back at all." (R. Br. sec. III, phase II cases, complaint pars. 5(b)–(e) at 4.)

The Respondent's argument fails because the statement of Agostinelli is unambiguously one of instruction on what they were to report to the Union about their past working experience. Because Agostinelli did not qualify his instruction or suggest they should report what they believed, it is clear that they were to testify as instructed irrespective of their beliefs. Such an instruction for purpose of this analysis in the context of a union grievance investigation is an instruction to disregard the truth and to report the company line. Even were the 10 percent coincidentally what the employees believed to be true, the employees were being instructed to do as they were told and, if the instruction was not consistent with their belief regarding the events, to lie. Such an instruction is an interference with the Union's representation of employees and more basically an interference with the employees right to engage in the protected activity of honestly and freely cooperating with their representative in supporting a grievance respecting their terms and conditions of employment. Agostinelli's conduct clearly chills employees' Section 7 rights and violates Section 8(a)(1) of the

I sustain this allegation of the complaint.

(3) Complaint subparagraphs 5(c)(iii) and (e)(v)

Complaint subparagraph 5(c)(iii) alleges that Agostinelli stated to an employee that if such employee thought he was owed backpay, he should discuss it with Agostinelli, thereby bypassing UFCW 8, dealing directly with the employee and discouraging employees from engaging in union activities. Complaint subparagraph 5(e)(v) alleges that Agostinelli told an employee that he would negotiate directly with such employee about potential backpay, thereby bypassing UFCW 8, dealing directly with the employee and discouraging the employee from engaging in union activities.

Agostinelli's affidavit provides the entire evidence respecting these allegations. It states in part:

After the union filed the grievance about courtesy clerks, I went to three courtesy clerks and told them that if they felt we owed them any money to come to me and let me know and I'd see if I could get it straightened out.

The General Counsel and the Charging Party argue that an employer who approaches individual employees during the union's investigation of a filed grievance and lets them know that if they felt they had monetary claims to come to management directly and they would try to "get it straightened out," is classic directly dealing designed to undermine the Union in

violation of the Act. The Charging Party cites in support: *General Electric Co.*, 150 NLRB 192, 194 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970); *Ad-Art, Inc.*, 290 NLRB 590, 606 (1988); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 969 (10th Cir. 1990). The Respondent argues the Act and the contract permits individual adjustment of grievances.

The conduct is uncontested, the context clear, and the cited cases apposite. The Respondent through its agent, Agostinelli, engaged in the direct dealing alleged and in so doing violated Section 8(a)(1) of the Act. I sustain these allegations of the complaint.

(4) Complaint subparagraphs 5(e)(i) and (ii)

Complaint subparagraph 5(e)(i) alleges that Agostinelli threatened that the Respondent would discharge all courtesy clerks because the courtesy clerks had contacted UFCW 8. Complaint subparagraph 5(e)(ii) alleges that Agostinelli threatened to discharge an employee because that employee contacted UFCW 8.

The General Counsel's evidence in support of these allegations is the affidavit of Harvie, as noted supra, respecting two conversations with Agostinelli, one in the presence of Koth. Koth and Agostinelli deny the substantive content of the conversations contained in the affidavit. Harvie while not repudiating the affidavit, sought to put an ameliorative face on it alluding to his earlier adversarial role in opposition to management. The General Counsel and the Union argue that Agostinelli and Koth were embarrassingly transparent in their strategy of simply denying any wrongdoing. Agostinelli, in their view, revealed his further determination to only aid the Respondent's view of the facts by repeatedly failing to recall even those things admitted in detail in his Board affidavit.

The Respondent makes a threshold argument that Harvie was at the time of the conversations a statutory supervisor as were Agostinelli and Koth. In consequence there were no statutory employees participating and no violation of the Act could be found irrespective of what words were exchanged in the two conversations. The Respondent further argues that the denials of Koth and Agostinelli—the latter in both his testimony and his affidavit—and the explanations of Harvie respecting the benign nature of the exchanges should be credited and the allegations dismissed.

I resolve the conflicting evidence in favor of the Respondent. While in agreement with the General Counsel, I found Agostinelli's denials of the any current memory of the admitted statements in his affidavit contrived, he denied the statements attributed to him in Harvie's affidavit in his own affidavit. While Koth's corroborating denial was short and he as a member of management is aligned in interest with the Respondent, these are insufficient grounds for dismissing his testimony. Fatal to the Government's case respecting the conversations at issue herein is that fact that I had no more confidence in Harvie or Harvie's affidavit than in any of the other evidence adduced on the issue. The Government bears the burden of proof and with this group of reluctant witnesses and qualified affidavits has not proved its case.

Accordingly, based on the record as a whole, the affidavits of the witnesses and the demeanor of Harvie, Koth, and Agostinelli, I find the General Counsel has not met his burden of proving that Agostinelli made the remarks attributed to him. I find therefore that the Respondent has not violated the Act as alleged and these subparagraphs of the complaint will be dismissed. That being so there is no need to address the supervisory issues raised respecting Harvie at the time of the events in question.

2. Local 368A—Complaint subparagraph 8(f)

Complaint subparagraph 8(f) alleges that Store Manager Bob Talbot at the Respondent's store #101 in Boise, Idaho, on July 7, 1997:

- (i) interrogated employees about their union activities on behalf of UFCW 368A;
- (ii) created the impression among employees that their union activities on behalf of UFCW 368A were under surveillance:
- (iii) impliedly threatened employees with unspecified reprisals because they were engaging in union activities on behalf of UFCW 368A.

a. Facts

At relevant times the store manager of the Respondent's store #101 in Boise, Idaho, was Bob Talbot. Certain of the employees of the store were represented by Charging Party Local 368A including shipping and receiving clerk Rich Seifert. Lori Barton, Local 368A business agent and a former employee of the Respondent, was assigned the store as part of her duties.

On July 7, 1997, Barton made a visit to the store. She spoke with an employee and went to the store's shipping and receiving area where she met Seifert. The events thereafter are in dispute. The undisputed participants in the events were Barton and Seifert whose testimony is considered below. Store Manager Talbot, Grocery Manager Campbell, and meat department employee Patty Nash did not testify.

(1) Barton's testimony

Barton testified that she visited the store on July 7, 1997, in response to employee reports of problems at the store. She reported in and then proceeded to talk to an employee asking if the employee "had heard about any problems with intimidation going on between management and employees." She then proceeded in the normal course to the back of the store and spoke to employee Seifert. She described Seifert as busy with vendors, merchandise, and paperwork and that she would speak with him and then step back when he became involved with store business. She testified she asked him: "[I]f he had heard of anything going on in the store. And he said no, that he was too busy, and he really didn't have any time to talk to anybody else in the store. So he didn't know anything."

Barton then went to the meat department and spoke with an employee at which time she was interrupted by the store manager, Talbot, and Grocery Manager Doug Campbell. She recalled that the two rushed up and Talbot in an excited way told her to leave his store. Barton asked why and Talbot told her: "I was not going to stay in his store and cause trouble." Barton denied she was causing trouble. She continued:

[Talbot] said, "Yes, you are causing trouble. You are telling employees that there is [sic] problems between management and employees.

I said, the problem is already here. I am not causing problems. I am just asking questions. He said, "I can prove you are causing problems. I will call Richie [Seifert] up here and ask him what you said to him."

And I said, "Well, it is really none of your business what I said to Richie, but whatever."

Seifert, summoned on the store intercom line, arrived and Talbot asked him to tell what he had been told by Barton. He did so, in Barton's memory exactly as she recalled her conversation with him. She then agreed that Seifert's report of their conversation was correct and added to Talbot: "So what is your point?" Talbot then asked Barton to leave the store and she refused. Talbot and Campbell left the area, Talbot in some heat. Barton finished her business and left the store in due course

(2) Seifert's testimony

Seifert testified that he was alone in the shipping and receiving area of the store busy with work tasks on a busy day. He described the events:

[Barton] approached me, and she wanted to talk to me while I was working about, you know, signing the petition that she had. And I politely told Laurie that I was very busy, I didn't have time, you know, to discuss it with her. She continued to follow me around the back room. This went on for about ten minutes.

Seifert recalled that he became frustrated and, using the store intercom system, spoke to Doug Campbell the grocery manager and told him that Barton was "back there bothering him and that he needed the grocery manager's help to talk to Barton. Barton heard these remarks and left the area. Soon thereafter Campbell arrived with Store Manager Talbot in train. Campbell asked Seifert to repeat what he had said to him to Talbot and Seifert did so.

Seifert remained in the shipping and receiving area but Campbell and Talbot left. Soon Seifert was called to the meat department where Campbell, Talbot, and Barton were. Seifert was asked by Talbot if Barton "was bothering me in the back room." Seifert said yes. The conversation continued, but Seifert then returned to the back of the store and, did not followed the conversation thereafter.

b. Analysis and conclusions

Each Party urges its witness and version of events be credited. Taking those differing versions of events, the General Counsel and the Charging Party argue the complaint is sustained and a violation proved. The Respondent argues that no violation took place.

The resolution of the different versions of events resolves the matter, in my view, with little legal analysis necessary. This is so because, if Seifert only reported to Talbot that Barton was bothering Seifert while he was working, Talbot could properly complain about that fact to Barton and have Seifert repeat his "bothering me" complaint to Barton in Nash's presence. In that

event there was clearly no interrogation, no impression of surveillance of union activities, or implied threat by the Respondent's agent.

If the opposite occurred and Talbot was upset because he had learned that Barton was "making trouble" by inquiring of employees about possible management misconduct and in consequence lectured, upbraided, and ordered Barton from the store—all in employee Nash's presence—for asking such questions, as well as then summoning Seifert and instructed him to recite the investigatory questions Barton had asked him-again in front of employee Nash—the Act was clearly violated. This is so because as the General Counsel and the Charging Party argue, the union agent's solicitations of employees respecting protected concerted activity are none of the Respondent's business. Talbot's conduct, in this scenario, amounts to an interrogation, creates in Nash the impression that management has the conversations between employees and their union representative under surveillance and, in the hostility expressed to Barton respecting such interrogation in Nash's presence is an implied threat to employees who provide information to their union representative.

Turning to the factual dispute, the evidence is unusual in that few of the participants testified and because two locations and different combinations of participants are involved at each location, so that two seemingly inconsistent, yet unchallenged descriptions exist. The individuals' testimony is set forth above, but the entire series of events must be considered as a whole to better weigh the probabilities as well as the consistencies and inconsistencies presented.

Barton's description of what she did prior to talking to Seifert is unchallenged. Seifert and Barton's versions of their meeting in the back of the store, while not identical, are not fundamentally at odds. Clearly Seifert was busy and indicated he had no information to provide Barton respecting management misconduct.

Seifert's testimony that he thereafter first called Campbell complaining of Barton's bothering him while he was working and that he thereafter repeated his complaints to Talbot is the sole evidence respecting these events. Talbot and Campbell did not testify respecting them. So too, Barton is the sole witness to testify respecting what occurred when Campbell and Talbot initially spoke with her in Nash's presence in the meat department. Barton's testimony in this regard is that Talbot in an agitated state complained to her that she was asking Seifert about "problems between management and employees." When she denied that this was the case, he summoned Seifert who arrived in short order. It is clear that these two half scenarios testified to by Siefert and Barton are fundamentally inconsistent: Did Seifert complain to Talbot about Barton "bothering him" or did he complain that Barton was asking about employer misconduct?

The first truly conflicting testimony of events is Barton and Seifert's versions of what occurred next. Each recites Talbot's angry accusation, Barton's denial, and Seifert's summoning and report. The two recitations agree on general format and the order of events but are diametrically opposed in the nature and content of Talbot's accusation respecting what Barton had told Seifert and Seifert's report of those remarks. Thus, Seifert

testified he confirmed to Talbot—consistent with his testimony of what he had in fact reported to Talbot in the shipping and receiving area—that Barton had been bothering him in the backroom. And Barton testified—consistent with her testimony of what she and Siefert had discussed in the backroom—that Siefert told Talbot "exactly what I said" and that she confirmed that fact to Talbot.

In resolving this dispute, I did not find demeanor to be a significant basis for favoring either witness. Nor do I find determinative the argued preferences and alliances of the witnesses. While it is clear that Barton is institutionally aligned with the Charging Party and Seifert is no longer an employee of the Respondent, his business relationship with the Respondent does not make him entirely neutral. Rather than one witness or the other willfully misstating the facts as he or she recalls them, I find the greater likelihood is that the two testified to the events as they recall them. Given that conclusion, I further find that it is necessary to consider the probabilities, i.e., that one or the other version of events is more likely—all with the fact that the Government bears the burden of proof well in mind.

Based on the testimony of the witnesses, the record as a whole, and undertaking the analysis described above, I find and conclude that the General Counsel has not met his burden of proof that the events occurred as testified to by Barton. It is clear and I find that Siefert complained first to Campbell and thereafter to Talbot about Barton. I find it is more likely that he would have initiated such a complaint because he felt he was being bothered in his work and less likely that he would have complained because Barton was asking him if he had knowledge of difficulties between employees and management. I further find it would then be more likely that he would report to Campbell and Talbot that he was "bothered" by Talbot rather than that he had been interrogated by her. It follows that, having received such a "bothered by" report, Talbot would have confronted Barton in those words and that Siefert would have corroborated that he had complained to Talbot about being bothered. While the matter is not free from difficulty, it is the General Counsel who bears the burden of proof and that factor supports the result reached.

Having found that Barton was taken to task by management as a result of an employee report that she was bothering the employee and that the Respondent's agent thereafter simply had the employee repeat his complaint that Barton had been bothering him, I find that the allegations of these subparagraphs of the complaint fail for want of proof. Accordingly I shall dismiss these complaint allegations.

3. Local 555

a. Complaint subparagraphs 8(g) and (h)(i) and 8(i)

Complaint subparagraph 8(g) alleges that in January and February 1998, the store manager of Redmond, Washington, store #589, Steve Allison:

(i) promulgated an unlawful rule by telling employees that they were not allowed to talk about UFCW 555 on Respondent's property including the parking lot; and (ii) threatened employees that if they did talk about UFCW 555 on Respondent's property they could be terminated.

Complaint subparagraph 8(h)(i) alleges that in February 1998 Allison:

[P]romulgated an unlawful rule by telling employees that they could not talk about UFCW 555 while working on the clock[.]

Complaint subparagraph 8(i) alleges that the Respondent's labor relations department counsel Dona Pike King on or about March 23, 1998:

promulgated an unlawful rule by telling employees that they could not talk about a union anywhere in the store or in the parking lot, that employees should not be talking about the union while employees were "on the clock."

(1) Facts

At relevant times the meat cutter employees of store #589 in Redmond, Washington, have been represented by Charging Party Local 555. Employee Norman Scurlock was a meat cutter in that unit in 1997–1998 and was the shop steward for the Union. In December 1997, or the beginning of 1998, the Union began an organizing drive to represent other employees at store #589. Scurlock testified that he had occasion to speak to unrepresented employees during the organizing drive before and after work and on breaks in the store employees' breakroom. Scurlock testified that during this period, which other evidence establishes as March 11, 1998, he was spoken to by Store Manager Steve Allison in the presence of later deceased Meat Department Manager Pepple.

Scurlock testified:

[Allison] said that he had received a call from Dona Pike King, and that we were not allowed to discuss the Union on the premises, on Albertson's premises. And we could not talk about it before work, after work, or in the parking lot, or in the break room. He didn't—basically, he said that he had to enforce that He said that he was obligated to enforce it, because it came from corporate. And that if we was caught talking about the Union on the premises, we could be terminated.

Scurlock testified he had not to that point ever had his activities restricted or been informed of any rule limiting employee communications on the Respondent's property.

Store Manager Allison testified that he had occasion to learn that meat cutter unit employees were distributing union authorization cards and called Boise Labor Relations Attorney Dona Pike King for advice. He believed he was told that such activities were impermissible. So he summoned Scurlock and Pepple to his office and, in his words: "I told them both that they weren't allowed to be doing that in the store on Company time or anything else."

Allison testified that he soon received a complaint from Pepper that the employees had checked with the Union and that his restrictions on their union activities were simply wrong. In response Allison checked again with King who informed him in his memory:

She said they could talk to other employees in the store on their lunch, on their breaks, in discussing this stuff if they wanted to, it could be while they're working on the clock during casual conversations between themselves as long as it wasn't disrupting anybody's work.

Allison testified he immediately took this information to the two employees and made it clear that the earlier restrictions were incorrect and were withdrawn. Mirroring King's recitation to him, Allison told them they were allowed to talk union in the lunchroom, on lunches and breaks and amongst themselves so long as it was casual conversation not interfering with anybody's work.

Scurlock remembered this second conversation with Allison as following the first by a week or two. Scurlock recalled:

Steve [Allison] approached me and—and said that Dona had got a hold of him and rescinded her first order, and that we could talk about the Union on the premises before work, after work, or during our breaks in the break room. . . . That we couldn't talk about the Union while we was on the job, while we was on the clock.

Allison testified that soon after this second conversation with the two employees, Union Representative Lin Mayes met with him and took him to task for restricting employees from talking about the Union. Allison told him that, although he had initially restricted the employees, he had "fixed" the mistake and had told the two:

I told [Mayes] that they could, in fact, talk about the Union in the store. They could, in fact, talk to the other employees that were non-union. They could do it in the lunch room, on their breaks, on lunches, they could do it amongst themselves while they're working as long as it wasn't disrupting anybody's work.

Mayes testified to meeting with Allison at the store on March 17 to discuss the reports he had gotten from the meat cutter employees the week before about Allison's announced restrictions on their on site union activities. Allison acknowledged his initial error but told Mayes he had corrected it. Mayes testified:

I also questioned Mr. Allison on whether or not other employees in the store could talk about the union as, that he was—my members were given the impression that they couldn't. And he told me that, yes, they were allowed to talk about it, talk about the union only on their own time such as if they were off the clock. The other issues that I spoke to Mr. Allison about was whether or not our union folks could talk to other employees in that store. And he said, yes, they could, that Dona rescinded her original directive that they couldn't, and he also told me at that time that they could—as long as they were off the clock, they could. But we could not contact them on, on the sales—while they were on the clock.

Mayes sent Allison a 2-page letter dated March 19, 1998, in large part confirming the substance of the conversation the two had just had. The recitation was consistent with Mayes' testimony of the meeting as described above, specifically noting that Allison's position was that the freedom the employees

were allowed to discuss the union was only "as long as they were off the clock, on their break or on their lunch hour." Allison did not personally respond to the letter orally or in writing.

Scurlock testified to a third conversation with Allison—on this occasion by himself—in which Allison related, and Scurlock denied, complaints Allison had received respecting employees talking about the Union. Scurlock testified that Allison concluded the conversation by reminding him: "[I]f I talked about the Union while I was on the clock, I could be terminated." Allison did not testify respecting this meeting.

On the morning of March 23, 1998, an employee meeting for the unorganized employees was held in the store attended by approximately 40–50 employees. The Respondent's labor relations department counsel, Dona Pike King, spoke. Employee Mary Ford recalled that King told employees they "couldn't talk about [the union] on the premises. . . . On or off the clock, as I recall. Whether you're on the clock or not."

Supervisor Nancy Henkemeyer testified that King informed employees that they:

[W]ere allowed to talk about [union matters] on the break, while you were on your lunch hour, and that she understood that you'd probably have casual conversations while you were working, but she preferred it not to interrupt your work.

Pressed by counsel for the General Counsel and refreshed by her Board affidavit, she conceded that King in part also said to the employees: "[T]here should be no talking about the Union things while the employees are on the clock."

King testified that she told the assembled employees that they had the right to solicit or converse about the Union during lunch periods, break periods, on an employees own time, and that they could also discuss the Union to the same extent they could discuss any other personal matter during working time provided that it did not interfere with their work. She denied that she told employees that they could not talk about the Union on company premises or time.

King testified her handwritten notes were prepared on the way to the meeting and were intended to be used during the meeting and were in fact used by her in addressing the employees. She also testified that all corrections were made before her presentation. Her notes, state in part (cross outs in the original):

We also understand that an ee [sic] in the meat department, who is represented by local 555, is talking to ees [sic] about union representation. This Employees have the right to discuss union representation so long neither none of the ees involved in the discussion are on the clock. [as] employees do so on their own time—breaks or lunches. The same rules apply to other topics of a personal non work related nature.

While employees clearly have the right to discuss these matters on their own time, and at other times, I want to emphasize that none of you have to talk to Jesse Lopez or anyone else if you do not want to.

Deli Service Manager Kathryn Harper attended the meeting. She testified that King addressed when union matters could be talked about. King, in Harper's recollection, told the employees that as long as they were on their own time they could discuss whatever they wanted. When they were on the clock, even during work, it was "still okay as long as it wasn't interfering with your work." Store Manager Allison essentially corroborated the Respondent's agent's versions.

On April 13, 1998, King wrote to Mayes referencing his letter to Allison and representing that her instructions to Allison and the Respondent's policies respecting discussion of union matters by employees had not changed and remained that employees were free to talk to fellow employees in the breakroom, in nonworking areas on lunch or on break. When an employee is "one [sic] the clock" or talking to others employees who are on the clock, employees may not talk about union matters "except to the same extent and duration that employees briefly discuss other personal matters when they are on the clock."

(2) Analysis and conclusions

(a) The Allison statements to Scurlock

The General Counsel and the Charging Party argue that the versions of events as related by Scurlock and Mayes should be credited over Allison and King. Given that factual finding they then argue, citing traditional Board law, that the restrictions on union activity that Allison put on employees at both his first and second meetings with them and in his third conversation with Scurlock violated Section 8(a)(1) of the Act. Similarly, the General Counsel urges that Ford be credited over the Respondent's agents regarding what she was told in their meeting and contends that Allison's similar statements to Ford respecting the restrictions on union activities were also a violation.

The Respondent urges the reverse credibility resolutions. Based on such resolutions, the Respondent argues that, although Allison mistakenly misreported an incorrect union activities rule initially to the two employees, he quickly thereafter corrected himself in their second meeting so that no significant period of misinformation took place. Thus, the Respondent argues that to the extent employees were misinformed, the error was swiftly cured and the matter should be dropped and the complaint allegations dismissed. The Respondent further argues that Ford should be discredited and a finding made that that no improper restriction of her union activities by Allison took place.

The General Counsel and the Charging Parties argue that even under such an incorrect view of the facts, the Respondent failed to give the employees the required assurances that the employer would not interfere with their union activities in future and point out that Ford received no "corrected version" of the Respondent's announced rules whatsoever.

The first Allison/Scurlock conversation is not in essential dispute. The second is. The issue is whether or not Allison, as he testified, corrected his characterization of the Respondent's rules against employee union activities to a legally correct version or, as Scurlock testified, he still asserted that employees "couldn't talk about the Union while we was on the job, while we was on the clock."

The General Counsel and Local 555 argue that Scurlock's version of the disputed statements in that meeting is corroborated by Mayes' testimony of the employees' reports to him, by his conversation with Allison in which Allison made essentially

the same statements, and, finally, by the confirming letter Mayes sent Allison to which Allison did not respond. The Respondent argues that the evidence of King's instruction and reinstruction to Allison as well as her correcting letter to Mayes support Allison.

Based on the demeanor of Allison and Scurlock as well as the demeanor of King and Mayes and the content and timing of their letters, and on the arguments of the parties and the record as a whole, I credit Scurlock's version of the critical second meeting of Allison, Scurlock, and Pepple and his undisputed testimony of his third conversation with Allison. I do so because Scurlock appeared to me to be truthfully relating the conversations as he remembered them. While I had less confidence in Allison who appeared to me to be very mindful to confirm to the evidentiary position of the Respondent, I relied significantly on the fact that Allison had at critical times an elusive understanding of the distinctions in the rules he received from King. I have little confidence he had a sufficient understanding at the time he relayed the rules on either occasion or in his conversation with Mayes to accurately recall what he said. King's statements to Allison respecting the rules to be applied are not of great significance in this regard since it was Allison who delivered the rules to the employees at issue herein. So, too, her letter "correcting" Mayes could not add or subtract from the substance of the earlier Allison-Mayes conversation. As to that conversation I credit Mayes over Allison on similar grounds. Mayes had a strong memory and an impressive demeanor. His letter to Allison demonstrated he paid attention to what he had been told, viewed it as important to establish particulars and also serves to corroborate his testi-

Given these factual findings, I further find—indeed there is little dispute on the applicable law—that the Respondent, through Allison on each of the two occasions as alleged in the complaint subparagraphs, overly restricted the union activities of employees. Since under this view of the facts, there were no subsequent rehabilitation efforts by the Respondent, ⁵³ indeed his third conversation with Scurlock makes it clear the invalid rule was being repeated, the Respondent's actions violated Section 8(a)(1) of the Act and I so find. I therefore sustain complaint subparagraphs 8(g) and (h)(i).

(b) The King statements to employees

The heart of the dispute respecting the King statements is what occurred as opposed to the law to be applied to the events. If King addressed the employees as she testified, her remarks were not violative of the Act. If the General Counsel's witness Ford's version of events be credited, then King wrongfully restricted employees. Each side advances its version of events. The Respondent relies on not only King's testimony but that of corroborating witnesses Harper.

The parties also dispute the significance of the testimony of Henkemeyer and the evidentiary value of King's notes. The General Counsel argues that Henkemeyer's affidavit supports the government's view of the case and that the notes support a finding that they were altered after the fact in an attempt to

⁵³ King's letter to Mayes was not directed to the employees.

disguise the fact that they support the Government. The Respondent argues on brief at section III, complaint paragraph 8(i) at 4: "Based on King's statements, Henkemeyer understood that casual conversation about the union was permitted as long as it did not interfere with an employee's work."

Ford's version of King's statements at the meeting is at wide variance from the other testimony. I find she was simply mistaken. There is some variation within the other versions, but the remaining testimony is clear and I find that the employees were told that they could continue the pattern that casual conversation could occur at work so long as it did not interfere with work, and, further, that that casual conversation may well include discussions about the union. I specifically find on this record that there is insufficient evidence to find that King altered her notes after the fact to conceal or disguise them or that they show that her remarks were improper.

Given these findings, I further find that the General Counsel has not sustained his burden of showing that the Respondent through King violated the Act. I shall therefore dismiss this element of the complaint.

b. Complaint subparagraphs 5(h)(ii) and 83(b)

Complaint subparagraph 8(h)(ii) alleges that Allison:

(ii) on or about March 12, 1998, promulgated an unlawful rule by telling employees that they had no right to talk about UFCW 555 in the parking lot and store.

Complaint subparagraph 83 (b) alleges:

Since on or about March 20, 1998 Respondent by Steve Allison, at Respondent's Store #589 in Redmond, Oregon discriminated against employee Mary Ford by issuing her a written warning for "Disclosing confidential information or any other similar act constituting disregard for Company's best interests."

The complaint alleges this latter conduct as a violation of Section 8(a)(3) and (1) of the Act.

(1) Facts

Store cashier Mary Ford learned of and began to assist in the organizing of employees at the store in February 1998. In February during her break she took down the weekly work schedule posted on the bulletin board in the store's upstairs employee breakroom and made a copy of it on the store's photocopier which is in the public area of the store and is coin and key operated. The schedule lists employees by both first and last name and the hours to be worked in the week. It contains no other information. In utilizing the copier Ford did not activate it by coin but rather obtained a master key which enabled it to be operated without inserting a coin. Ford later sought employee phone numbers from other sources, but did not obtain them nor employee addresses.

Ford testified that at the end of the month she was pulled out of her check stand and asked by Allison with Front-End Manager Becky Hatfield present whether or not she had copied the work schedule and asked another employee for employee phone numbers. She indicated she had. Ford testified to a second meeting established as occurring on March 12, 1998, upstairs in Allison's office with Allison and Assistant Man-

ager/Grocery Manager Dave Campagna and bookkeeper Betty O'Keefe present. Allison asked her if she made the copy of the schedule on the store copier and if she had used the key to the copier, i.e. had not paid for her copy, and she said she had.

Ford recalled that Allison told her:

He said that didn't you know that—that you couldn't talk about the Union on the—on the—in the store or in the parking lot. And—I said no. Oh, thank you very much. I was very scared. I asked him if I was fired and he said he would have to check with the main office. I went back to work.

Allison testified he had no recollection of talking to Ford about restrictions on union activity on the Respondent's property at this meeting or any other time, but that he may have done so. Dave Campagna and Betty O'Keefe each testified that Allison made no statements to Ford respecting rules limiting where or when union activities could be conducted.

Later that same day, Ford was summoned from her cash register upstairs to Allison's office and there met with Allison and Lobby Manager Linda Alfima. Ford recalled:

Well, Steve [Allison] was asking me about—he asked me how I made the copy machine—how I made the schedule. And I told him I used the copy machine keys. And he asked Linda is that pretty regular. And she said, yes, because everybody used the copying machine keys.

Allison asked her if she had given computer passwords to a nonemployee and she denied that she had. He asked her to write out a statement of her activities and she did so leaving it on his desk. The statement recites that at a union meeting:

April (UFCW) asked if possible old schedule copy would be great that way the correct names and spelling. I did make copy on store copier I gave it to Jesse who was to give it to April (UFCW).

Allison did not testify respecting this conversation. Linda Alfima did not testify.

A few days later Ford asked Allison:

[Do] I still have a job or did you hear from the main offices[?] He said something to the effect that we would have known by now if you were going to be fired.

On March 20, 1998, Ford was presented with, required to sign and did sign a one page memorandum and was told a copy would be put in her file. The memorandum from Allison was captioned: "Violation of Company Policy." The memorandum states in part:

[C]ertain conduct is cause for immediate dismissal without prior warning. Those that apply are listed below:

- Disclosing confidential information or any other similar act constituting disregard for the Company's best interests.
- Dishonesty in any form in connection with work
- Unauthorized possession of company property or of willful or grossly negligent destruction or damage to Company funds or merchandise.

We have received information that you copied the work schedule and gave a copy of the schedule to a third

party, Jesse Lopez. In addition, you made this copy while on company time. You used the store's copy machine, and failed to pay for the copy. This conduct is clearly inappropriate.

You are not authorized to disclose company information, including work schedules to outside parties for any reason. You are not authorized to use company property for personal use. For example the company copy machine is for business only. All personal use requires payment.

Failure to follow company policies will result in discipline up to and including termination.

Allison testified he required Ford to sign the memo, but that it was not disciplinary.

Some time thereafter Ford observed a fellow employee copying the work schedule on the store copying machine and spoke to Campagna about it. Campagna answered, in her recollection, the employee was just making a copy for her own schedule. Campagna did not testify respecting this conversation.

King's notes respecting her March 23, 1998 address to employees state in part:

We have received complaints from employees that the union has contacted them at home. Many employees are upset th[at] the union has obtained home addresses and phone #'s. Many have asked how the union got this info. I want to assure all of you the company has not provided this info to the union. We carefully guard as confidential employee addresses and phone #'s.

Based upon our investigation we understand that an ee [sic] here at the Store took a work schedule and copied it on the store copier and them gave it to a former ee [sic] who now works for Safeway and holds himself out to be a union shop steward. That is how the union got your names and how they were able to get other information such as your addresses and phone #'s.

Some of you may know this person. His name is Jesse Lopez.... The employee who gave him the schedules has admitted she gave him the schedule to give to a union organizer named April. April is the organizer who tried to get employees at Store 548 vote for the union.

We have received reports that Jesse Lopez has told ees [sic] that the Co[.] is required to give the union names, addresses, and phone numbers of ees [sic], This is not true. And as I said, we consider this information to be confidential. The only time a co is ever required to make this info available when the union does not represent employees is during a formal supervised NLRB election. This is not the situation we have here.

(2) Analysis and conclusions

(a) Complaint subparagraph 8(h)(ii)

As with the other allegations discussed supra, the disagreement of the parties respecting complaint subparagraph 8(h)(ii) is on what occurred rather than the law as it should be applied. If Ford's testimony of Allison's statements about union activity are credited, a violation occurred. If not: not. I have considered the testimony of Ford noted above and the denials of the other meeting participants. I credit Allison, Campagna, and Hatfield.

Ford was by her own admission scared during the meeting. The absence of corroboration for Ford, the straightforward corroborating testimony of Campagna and Hatfield, and the burden the General Counsel bears combine in my view to defeat the complaint allegation. I do not doubt that Ford was testifying truthfully to her recollection of the events. Indeed given my findings above that Allison had still "got it wrong" during the time period in question, I do not find it impossible or even unlikely that Allison might well have made such a remark. Given the entire body of evidence bearing of the allegation, however, I conclude that the General Counsel has not met his burden. Accordingly, I shall dismiss complaint subparagraph 8(h)(ii).

(b) Complaint subparagraph 83(b)

The complaint alleges that Ford received a "written warning for 'Disclosing confidential information or any other similar act constituting disregard for Company's best interests'" in violation of Section 8(a)(3) and (1) of the Act. ⁵⁴ The March 20, 1998 memorandum given to Ford is not in dispute. The General Counsel and the Charging Party argue that the discipline was to punish Ford for giving employees' names to the Union and that the Respondent's assertions that she received the document because the schedule was confidential and the copying was not paid for were simple pretext to conceal the Respondent's illegal motivations.

The Respondent makes a variety of arguments. First, it claims that no discipline or written warning was given Ford, that the memo was simple advisory. Second, the Respondent argues that the memorandum was given for the conduct it describes and rightly so. Thus, the Respondent has legitimate interests in maintaining the confidentiality of its schedules, in having employees work on their working time and in having its retail services, in this case copying, paid for by employees using them. Thus, argues the Respondent, no violation of the Act occurred.

Dealing with the question of whether or not the memorandum should be considered a warning. I find that it clearly must. The test is whether or not the employee would reasonably perceive the memo to be a warning and whether or not the Respondent had reasonable clause to believe that the memo would be so perceived by Ford. The Oxford English Dictionary, First Edition, defines a warning in part as cautionary advice against imprudent or vicious action or neglect of duty. Surely that is a good description of the memorandum quoted in part, supra. Further, it is clear that the Respondent well knew and indeed played upon Ford's fears respecting possible punishment for her conduct. Thus, Ford asked if she was going to be terminated in a meeting with Allison and was told that such a decision would be made in Boise. When she again asked her fate some days later, Allison simply told he that if she was to have been fired they would have been told. In such a context, the issuance of the memo was clearly recognized by both Allison and Ford for what it was: a written warning giving Ford cautionary advice against imprudent action or neglect of duty.

⁵⁴ The rule cited by the Respondent as quoted here is also under attack in complaint subpar. 79(a)(iii), and has been found to violate the Act. See discussion infra.

Why was the memorandum issued to Ford? The memo describes Ford's conduct the Respondent found improper: (1) copying the work schedule; (2) doing so on company time; (3) not paying for the copying; and (4) giving the copy to a third party. Ford denied copying the schedule on the clock and there is no evidence that she did so. Ford testified to observing an employee copy the schedule and when she reported that fact to management was assured that the schedule was being copied for personal use. From that credible testimony I conclude that the act of coping, in and of itself was not a matter of significance let alone a basis for discipline. On this record, I do not find that a significant factor in the Respondent's motivation for issuing the memo was Ford's copying the work schedule or a belief that she did so on company time.

The Respondent argues that it is entitled to have employee copying paid for and that there is insufficient evidence that the Respondent was lax in requiring such payment from employees. Ford testified as quoted above that Allison asked Linda Alfima if coping by employees by using the key to avoid paying for it was "pretty regular" and that she answered that, "everybody used the copying machine keys." While counsel for the Respondent seeks to diminish this testimony as "hearsay," it is rather an admission by party opponent and proper substantive evidence for the truth of the matter asserted and it is evidence that Allison had been told copying was commonplace. I found it significant evidence. On this record, I do not find that the true motivation for the memo was Ford's failure to pay for the copying.

Both by the elimination of the alternatives and by independent evaluation of the entire record, I find and conclude that the motivation for the issuance of the memorandum was the fact that a copy of the schedule was given to a "third party." I find that the discipline would have been administered no matter how Ford got the schedule and whether or not she copied it at the store or not and whether or not she paid for the copying. There is no question in my mind that the memo and its justification must stand or fall on the issue of confidentiality.

The parties differ respecting that single element. The General Counsel and the Charging Party emphasize that the third party involved was not just any outside party, it was the Union. They argue further that the information which was disclosed to the fury of the Respondent was simply the store's employees' names and the correct spellings of those names—nothing more. The Respondent argues that the schedule contains confidential information regarding hours of work that could be used by outsiders to the detriment of employees and could be used by competitors for commercial advantage. The Government and the Local argue that such assertions are incredible and offered only as pretext to cloak the true motive of the Respondent.

For the reasons appearing below, I find that the motivating factor for the Respondent issuing the March 20, 1998 memorandum to Ford was because of her providing the names of employees to the Union and for no other significant reason.

The Respondent well knew who the "third party" was that got the schedule. While former employee and Safeway employee and independently confirmed Union Steward Lopez was the intermediary, the schedule was for the Union. King's report to the employees 3 days after the memorandum issued makes

that clear. As King told employees: the employee who had copied the schedule "gave [Lopez] the schedule to give to a union organizer named April." The Respondent also knew from the statement that Ford gave Allison on March 12, 1998, that the Union wanted an "old schedule copy . . . [for] correct names—spelling."

Not only did the Respondent know that the Union wanted the schedule for employee names and spellings in furtherance of its organizing drive, the record is clear that the Union generally had access to posted schedules and, upon request, regularly was given copies of schedules of represented employees. The Union represented the meat cutters in the store and union agents had access to the breakroom and the general schedules displayed on the bulletin board. The Respondent provided no objective basis that there were grounds to fear the Union would engage in misconduct associated with knowing employees working hours or in assisting competitors if they got the schedule in question. Nor was such evidence offered respecting Lopez, a former employee.

Important to this finding are the remarks of King at the March 23, 1998 meeting of employees. The address, illuminated by her narrative notes quoted in part, supra, focuses on informing employees how the Union, once it got their names, would use that information to obtain their addresses and phone numbers and visit them at their homes. King went to lengths to assure the employees that the Respondent would guard their personal information. Thus, she informed the employees that their addresses and phone numbers were confidential and included employee names as well. Her notes state:

We have received reports that Jesse Lopez has told ees [sic] that the Co is required to give the union names, addresses, and phone numbers of ees. This is not true. And as I said, we consider this information to be confidential.

In this context of the Respondent assuring employees it would protect their personal information, King informed the employees that the unnamed employee copied a schedule and gave it through Lopez to the Union. King added: "That is how the union got your names and how they were able to get other information such as your addresses and phone #'s." I find there is simply no question that Ford received the discipline noted because she conveyed employee names to the Union. I specifically reject the argument that the employees' hours of work contained in the schedule made it confidential in regards to the Union or to Lopez as an intermediary. I also reject the argument that Ford's role in supplying the Union the schedule copy, through Lopez, was a legitimate motivation for issuing the memo to Ford.⁵⁵

⁵⁵ In light of my findings, it is unnecessary to determine if the Respondent waived the confidentiality of its schedules. Were it necessary to reach that issue I would find, in agreement with the General Counsel and the Union, that the Respondent did not treat its schedules as confidential. Thus as discussed, it acquiesced in photo reproduction for "personal use," allowed outsiders access to the breakroom where schedules were posted and allowed the Union similar access to the breakroom. Indeed the Respondent regularly gave the Union copies of schedules. Finally, the fact that Lopez worked for a competitor and served as an intermediary carrying the schedule to the Union is not of

Having narrowed the employee conduct and the employer motivation involved, the question remains: May an employer prohibit and or discipline an employee for revealing to a union organizing the employer's employees the names of the employees? The law is clear that an employer may not so restrict employees. *Cook County College Teachers Union Local 1600*, 331 NLRB 118 (2000); *Gray Flooring*, 212 NLRB 668 (1974); *Ridgley Mfg. Co.*, 207 NLRB 193 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975).

Given all the above, I find and conclude that the Respondent violated Section 8(a)(3) and (1) of the complaint as alleged in complaint subparagraph 83(b).

c. Complaint paragraph 77

Complaint paragraph 77 alleges:

- (a) On about February 14, 1997, and effective February 28, 1997, Respondent at least within the state of Oregon unilaterally changed its policy concerning discipline of employees who engage in sales of alcohol and tobacco to minors.
- (b) The subject set forth in paragraph 77(a) relates to wages, hours and other terms and conditions of employment of the Portland Grocery Unit and Vancouver Meat Unit set forth above in paragraphs 30 and 31 and is a mandatory subject for the purposes of collective bargaining.
- (c) Respondent engaged in the conduct described above in paragraph 77(a) without prior notice to UFCW 555 and without affording UFCW 555 an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

(1) Facts

Local 555 represents certain of the Respondent's store employees in Oregon and Washington. At all relevant times it has been contrary to applicable Federal and State laws to sell alcohol and tobacco products to underage customers. The Respondent's policies have reflected this fact. The Respondent's written "Policy Prohibiting the Sale of Alcoholic Beverages and Tobacco to Minors for the State of Oregon" had to be signed by each store employees and the signed copy was put in each employee's personnel file. The policy stated, in part:

Any employees who sells alcoholic beverages or tobacco to a minor, assists a minor in the purchase of alcoholic beverages or tobacco or in any way assists or encourages some other person to do so, will be subject to immediate suspension and/or termination.

There has not been a long history of the application of the policy. The Respondent contends that it has consistently discharged employees for first-time offenses of the policy. Em-

significance. I make this finding for two reasons: first because I have found that issues of work hours or proprietary information was not the true motivating factor behind issuing the memo, but was rather a pretext as argued by the General Counsel and the Union; second, because the record is devoid of any evidence that this former employee of the Respondent was suspected of such improprieties involving employee schedules.

ployee Christian Clouser was discharged in May 1996. Former Local 555 grievance director and now secretary/treasurer testified that he was completely unaware of the Clouser discharge and that Clouser had not filed a grievance respecting it. The record reflects that two employees, Kevin Hines and Grant Cowthorp, were discharged in the period of 1992 through 1996, but the employees were reinstated following union challenge. Hines was reinstated after his grievance was settled on a "non-precedential" basis.

In December 1996, employee Grant Cowthorp was discharged from Store 559 for a first-time alcohol policy violation and a grievance was filed. In January 1997, two dozen employees of the store signed a petition to King that began with the statement:

We employees of Albertson's #559 wish the company would reconsider its policy of immediately terminating good employees the first time they make the honest error of selling cigarettes or liquor to minors.

Stuart Fishman the Union's store steward transmitted the petition on his personal letterhead to King. There is no evidence the Union was informed of the letter or of its transmission to King. Thereafter the grievance was settled by the Respondent and the Union, and Cowthorp was reinstated as part of the settlement.

On June 24, 1996, King wrote to Clay in denying the Hines termination grievance. In her letter she asserts, "As you know, Albertson's has had a strong and consistently enforced policy of terminating employees who sell tobacco or alcohol products to minors." King also testified that she had conversations with Union Official Clay, Union Agent Darrell Coffey, and Collective-Bargaining Director Robert Patterson in which she made it clear that the Respondent's position had consistently been and was that a first offense of the policy required automatic termination of the employee. Clay denied that King made the remarks she testified to or put the remarks in the context that she was defending the discharge of various employees whose discharges were in the grievance process. Coffey and Patterson denied having any such conversations with King.

The alcohol policy and whether it supported automatic first offense termination was in dispute between the parties before February 1997. It the subject of a September 1996 grievance and May 1997 arbitration hearing respecting employee Andrew Grossman who was discharged for the sale of an alcoholic beverage to a minor in September 1996. In that dispute the parties argued, as described by Arbitrator Kenneth M. McCaffree in his August 6, 1997 award:

⁵⁶ R. Exh. 194, comprising the employee petition and the Fishman transmittal document, was objected to as hearsay by the Government and the Charging Party. The Respondent offered the document as an admission by the Union. I took the matter under advisement and here receive the document as a proper part of the Respondent's evidentiary record respecting the status of Fishman as agent of the Union in various respects are discussed elsewhere in this decision. As discussed infra, I do not find Fishman to have been an agent of the Union respecting this exhibit. I shall retain the exhibit as part of the Respondent's evidentiary record for possible consideration on review.

The Employer contends however, that the current [Policy Prohibiting the Sale of Alcoholic Beverages and Tobacco to Minors for the State of Oregon]⁵⁷ is a "strict liability" policy that requires immediate termination on the first offense of selling alcoholic beverages to a minor. The union contended that such was not the case, that the policy provides for and the Agreement then requires a warning under certain circumstances as those in this case before termination may be taken for just cause.

The arbitrator found that the Respondent's policy was "ambiguous and unclear" with regard to discipline for the first offense" and ordered the employee's termination set aside and the employee reinstated after a constructive 90-day suspension

On February 14, 1997, the Respondent sent to all its Oregon store directors and division front-end managers a memorandum respecting new tobacco sales regulations to go into effect February 28, 1997. Along with the memo was a new "checker affidavit." Store management was instructed to have all employees who check read and sign a copy of the policy with the signed copy placed in the employees personnel file. The form for employee signature asserts in part:

ANY EMPLOYEE WHO:

- Sells alcoholic beverages or tobacco to a minor; or
- Assists a minor in purchasing alcohol or tobacco

Will be immediately discharged. [Bulleting and bolding in original.]

King who drafted the language testified it was simply a "clear communication of what our practice was and not a change in our policy," at a time when she felt the two sides were locked into opposing views on the question.

The Union was not notified of nor offered an opportunity to bargain respecting the policy prior to the issuance of the memorandum. Rather, the Union first learned of the policy in May 1997 from a witness in a May 22, 1997 arbitration when an employee informed Union Business Agent Jeff Anderson that he had been required to read and sign in acknowledgement a new alcohol sale to minors policy. The Union first obtained a copy of the policy a short time later.

The Respondent has not rescinded the policy and the Union filed its charge in August 18, 1997, amending the charge on September 2, October 14, and December 16, 1997. The Union and the Respondent were in negotiations in early 1998. In multiemployer negotiations the companies and the Union agreed to new language which provided the Union "consistent with past practice" would not challenge or demand the right to bargain over policies and work rules at the time of their issuance but rather would raise them in the grievance process. In time the language was added to other Oregon division contracts as they were renegotiated.

On July 19, 1997, store #572 employee Andrew Grossman was discharged for violation of the policy for the first offense. The matter was grieved and taken to arbitration. Arbitrator McCaffree in his June 11, 1998 award sustained the discharge and relied explicitly on the February 1997 policy, quoted supra, which calls for "immediate termination" for violations to sustain the termination.⁵⁹

In February 1998, the Union and the Respondent asked the Board's Regional Director to defer the matter to arbitration, but the request was refused. The Union on September 25, 1998, also requested that the charge be withdrawn, but the Regional Director refused. The Union's withdrawal request has not been withdrawn.

The General Counsel and the Charging Party argue that the change in the Respondent's rule was significant, unannounced and the Respondent at no time provided the Union with an opportunity to bargain over its issuance. Thus, they argue a classic unilateral change violative of Section 8(a)(5) and (1) of the Act occurred.

The Respondent makes several threshold arguments. It argues that the matter should be deferred to the arbitral process. It argues that the Union waived its right to bargain over company policies and work issues at the time of their issue in 1998 and that the waiver applied retroactively. It argues that the six month limitation in Section 10(b) of the Act should be held to run from the time all the employees, including shop stewards, received the policy in February 1997, which requires dismissal of the charge. Finally it asks that the Union's still outstanding withdrawal request be honored. The General Counsel and the Charging Party oppose these arguments.

The Respondent offers additional argument on the merits. First, the Respondent argues that the February 1997 automatic discharge rule was not a change in the Respondent's "Disciplinary Approach." Thus, it argues that, irrespective of the final outcome of challenged discharges, discharge for first time policy violations was the Respondent's consistent position. "In determining whether this constitutes a change in position, the proper comparison is to Albertson's prior position and not the ultimate results of the grievance and arbitration process." (R. Br. sec. III, phase II cases, complaint par. 77 at 11.)

Second, the Respondent argues that since the parties had discussed their firmly held and diametrically opposed views on the issue of the "automatic" or setting specific discipline to be issued to first-time offenders of the Respondent's policy, further discussions would not have changed the parties position. Thus the Respondent argues, the parties were at impasse and the Respondent was therefore free to implement its policy, even if it were a change.

It is appropriate to consider each of the Respondent's arguments as follows. The threshold issues of withdrawal, deferral and statute of limitations dismissal should be first addressed. Turning to the Respondent's motion that I approve the with-

⁵⁷ The policy relied on by the arbitrator differed from the quoted policies in place before and after February 1997 in that it has a separate paragraph calling for "disciplinary action which may include discharge" for failure to check identification.

⁵⁸ A period more than 6 months after the February 1997 policy implementation, but less than 6 months after the Union had actual knowledge of the policy.

⁵⁹ The arbitrator also asserted:

At the same time I recognized that the right of the Employer to establish its current alcohol sales and related disciplinary policy unilaterally remains at issue as a matter outside my jurisdiction.

⁶⁰ The R. Br. sec. III, phase II cases, complaint par. 77 at 9.

drawal request of the Charging Party, the counsel for the General Counsel opposes the motion on the same grounds that they opposed the other approval of withdrawal motions herein: that the unfair labor practices proved in the instant matter as well as the earlier Board and court decisions cited in the complaint establish a history of violations of the Act by the Respondent that make approval of the withdrawal inappropriate.

Based on the application of the Board's *Independent Stave* standard to the motion, and as set forth in detail in my consideration of the identical motion in my analysis of complaint paragraph 58 supra, I agree that the Government has established a history of violations of the Act sufficient to defeat the withdrawal motion herein. Accordingly I shall deny the motion, decline to approve the withdrawal request and address the complaint allegations underlying the charge on their merits.

I reach the same conclusion respecting the deferral motion. The Board decision cited by the Charging Party International on brief at 136 footnote 49, is controlling. In *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB 321 (1998) (the Board held that where "an allegation for which deferral is sought . . . is inextricably intertwined related to another allegation for which deferral is not sought . . . the request for deferral must be denied"). I have found that the General Counsel has established a basis for consolidating the instant cases and for considering them as a unit for purposes of remedy. I find that on this record, as discussed extensively elsewhere in the decision, the pattern and practice arguments of the General Counsel are sufficient to prevent a piecemeal deferral of elements of the consolidated matter.

The Respondent's motion to dismiss based on the passage of time between the Charging Party's actual or constructive knowledge of the rule and the filing of the charge turns on the issue, explicitly advanced by the Respondent, of whether or not the Local was constructively on notice of the Respondent's new rule's distribution when the rule was given to the Union's job stewards. The Respondent argues that the Local's job stewards at most if not all of the Charging Party's represented stores in Oregon were put on notice of the rule by being informed of, and required to sign off on, a copy in February 1997, like all other store employees.

As discussed, infra, respecting Fishman's role as job steward, there are different levels of problems on the job that a job steward is involved in and other broader issues respecting which he or she has little or no role. So, too, there are different types of information to which a store job steward is exposed. The rule at issue here is a statewide rule rather than a local store-based rule. As such, its implementation in the abstract, without application to a store based event or employee, is not of immediate or direct concern to the local steward in his or her role as agent of the Union and the steward would not be reasonably expected to report its issuance to his superiors in the Union. Therefore the Union is not reasonably or constructively put on notice of the existence of such a rule by the fact that stewards, in their role as store employees, are required to sign a copy of the rule thereby acknowledging that they have read it.

Having found that there is no constructive knowledge by the Union of the February issuance of the rule, I find that the record evidence of the Union's actual discovery of the rule in May triggers the statutory time limits of Section 10(b) of the Act. Using that date, the charge was filed timely. Therefore, the motion to dismiss based on Section 10(b) of the Act is denied.

The Respondent argues that with respect to the February 1997 rule, the Charging Party explicitly waived its right to right to request bargaining or file a charge respecting unilateral changes in a two-stage process. First, the Union agreed in its post event contracts that it would not challenge or demand the right to bargain over company policies and work rules at the time of issue. Second, the Union agreed to apply this language to the then outstanding charges and withdraw the unfair labor practice charges. Therefore, argues the Respondent, the allegations must be dismissed.

I find that the argument is in fact a reprise of the earlier assertion that the withdrawal should be approved. The postevent agreement, like many broad settlements including the one the Charging Party entered into as noted supra, calls for a charging party to withdraw a charge. The Board does not consider such agreements to constitute a waiver of the original statutory rights of the party. Were it so, any charging party could defeat the review and approval process inherent in submitting a withdrawal request for approval to the Regional Director and turn the review process into a fiction, by simply entering into an agreement not only to withdraw the charge but to retroactively waive the original statutory rights alleged to have been violated in the original charge. Accordingly, I reject the argument of the Respondent.⁶¹

Turning to the merits of the allegation, the Respondent argues that the February 1997 form did not effectuate a change in the Respondent's approach to first-time policy offences and, therefore, there being no change in the Respondent's position, there was no change of substance cognizable by the Act and therefore no violation of the Act.

The General Counsel and Local 555 emphasize it is not the position of the Respondent regarding earlier instances of firsttime violations of the policy that was changed in February 1997 by the new rule's secret implementation, but the outcome of future first-time violations of the rule by represented employees. Thus, they argue that the previous rules were such that, even if the Respondent initially sought to discharge first-time offenders, they could not prevail under the old rule in arbitration and therefore often settled grievances with nondischarge outcomes. Under the new importantly different rule, the Government and the Charging Party argue, first-time offender automatic discharges will no longer be successfully defeated in arbitration—as has already been demonstrated—and the Respondent will doubtless cease settling grievances with short of discharge outcomes. The new rule is therefore an important and significant change in the contractual scheme with important and immediate consequences which rule was initiated secretly

⁶¹ The Government and the Charging Party advance with case authority two propositions: one, that a waiver of rights must be clear and explicit and was not in this case; two, that the Respondent may not make the argument herein because it failed to notify the Charging Party of the rule in a timely manner. In light of my ruling above, it is unnecessary to address these arguments.

by the Respondent without providing either notice to or an opportunity to bargain to the Union.

I agree with the General Counsel and the Charging Party that the rule constituted an important change in employees' working conditions. The position of the Respondent that the rule was simply a reiteration of its position respecting automatic termination of first time violators of its tobacco and alcohol policy and that policy had never changed simply misses the mark. The new rule is far more than an iteration of policy, rather it is part of the procedural matrix of rules, which under the contract an arbitrator looks to determine the appropriateness of an employer's actions. The Union is surely correct that the existence of the rule makes it more difficult for the Union to successfully resist automatic discharges in first time policy violation cases. That is the heart of the matter, not the position of the Respondent at arbitration or to the Unions in grievances that all violators should be automatically discharged.

The Respondent argues further that, since the Local and the Respondent were at loggerheads respecting their fixed positions concerning first time violations, they were at impasse and the Respondent was therefore entitled to implement its position in the new rule. I reject this approach as without reason or supporting precedent. The fact that the parties were in fixed, uncompromising positions respecting grievances does not translate into an impasse on the creation of a new rule respecting the subject matter of the grievances. It may be that, if the Respondent proposed a rule and sought to bargain about it, the Union would have fixedly opposed and in time the parties may have come to an impasse. Such a situation did not arise. The Union was not put to the test. I therefore reject the asserted defense proffered by the Respondent. I also reject the Respondent's argument that the contractual process allows changes in rules of the type at issue here and therefore the Act could not be violated by such a change. The cases and the record, including the arbitrator decisions finding the rules in place at the time of the employee policy violation, are important, do not support the proposition that rules which are subject to review by an arbitrator may for that reason be changed by an employer unilaterally with impunity.

Given all the above, I find that the Respondent unilaterally implemented a significant new rule in February 1997 respecting the automatic termination of first time violators of the Respondent's alcohol and tobacco sales policies without notice to or an opportunity to bargain provided to Local 555. In so doing the Respondent violated Section 8(a)(5) and (1) of the Act.

d. Complaint subparagraph 83(a)

Complaint subparagraph 83(a) asserts:

(a) Since on or about December 1, 1997, Respondent, through its agent David Fiebich, discriminated against employee Stuart Fishman by issuing him a written warning for posting union materials on the bulletin board at Respondent's Store #559.

The complaint at paragraph 86 alleges this conduct violated Section 8(a)(3) and (1) of the Act. The complaint does not allege the conduct as a violation of Section 8(a)(5) of the Act.

(1) Facts

Local 555 represents certain employees of the Respondent's store #559 (the Greenway store) in Beaverton, Oregon. At relevant times the store director was David Fiebich. Stuart Fishman, a Charging Party herein, at relevant times had been a longtime produce clerk, Local 555 member, shop steward, union executive board member from 1997, and represented employee at the store until 2000. The store at all relevant times had a second story lunch or break room with several bulletin boards.

The Respondent maintains an employee handbook that applied to store #559 and was issued to all its employees. At relevant times the handbook asserted: "Each store has a bulletin board on which current items of store business and special instructions are posted."

Labor Relations Attorney Barbara Pike King who was responsible for Oregon stores, testified that she consistently told store directors during the relevant period that store bulletin boards were for company business and did not permit posting of materials by third parties or materials that were not specifically work related. One unwritten exception, however, was that Local 555 was permitted to postunion meeting notices. King further testified that she enforced this rule personally when she was in stores, pulling down nonconforming postings.

Fishman testified that throughout his dozen years as a store employee and as shop steward he regularly posted union materials, labor educational materials, news clippings, and occasional personal notes such as for sale notices on a bulletin board in the break room and that other employees also regularly posted personal items. He asserted that during his employment at the store until the events in question as described below, he was unaware of any company rule or policy prohibiting or limited posting of nonbusiness items on the bulletin board. More specifically, he testified Monte Atkinson, the store director until 1995, was silent on the matter and that David Fiebich, store director from May 1995, initially told him he could post educational information relating to the union and to labor issues on a break room bulletin board.

Fiebich testified that he had occasion in January 1996 to see a union newsletter article on his desk that was also posted on the bulletin board which "didn't paint Albertson's in very good favor. I didn't know if it was something we should post on the bulletin board." In consequence, he telephoned King in Boise for counsel. He described the conversation:

I read the article to her, and asked her if it was something that we had to post on our bulletin boards. I didn't agree with posting it there. And she said that actually, according to our no solicitation policy, we do not have to post anything. We do not post anything that is not of a nature from Albertson's or in union stores, meeting notices. And that's the policy, and that was the first I was aware of it.

Fiebich testified further:

I pulled down the posting, talked to Stuart [Fishman], told him that in the future, the only thing that he'd be able to post would be meeting notices, and there wasn't to be anything up there other than Albertson's material.

Fishman testified that a few days before January 18, 1996, he had posted a Local 555 newsletter, *The Frontlines*, on the bulletin board which contained an article describing charges against the Respondent for allowing employees to work "off the clock." On January 18, 1996, he recalled that he went to the director and complained that a union newsletter had been taken down. Fiebich told him he had removed the newsletter because of the "off the clock article" which had made him angry. He told Fishman that he had checked with Boise before removing the article and that he had been allowing me to post articles just to "humor me."

Fishman testified that after this conversation he continued to post materials as before and that he observed that other employees continued to post their personal items. Thus, on January 21, 1996, he observed a posted bakery clerk's for sale sign for personal items and thereafter observed offers for child care and for sale signs for exercise equipment and automobile tires.

Fiebich testified that three or four times a month after this conversation, he would have occasion to be in the break room when he would notice bulletin board postings and would remove non-Albertson's generated postings other than union meeting notices such as for sale notes and that, although policing the bulletin boards was not his highest priority, he never knowingly left posted any non-Albertson's materials other than union meeting notices. He observed that union and labor related postings beyond union meeting notices were regularly posted thereafter and he would remove them. He testified he would tell Fishman he was removing those articles and reiterated the rule that they were not to be posted, but did not discipline Fishman for his violations of the rule nor discipline any other employee.

Fishman testified that on July 27, 1997, Fiebich again told him he was removing union postings and 2 days later, on July 29, 1997, told him "that only non-business, only Albertson's business materials were allowed on the bulletin board, and that Dona Pike-King had said the bulletin boards belong to Albertson's." Fishman complained that there were other items posted on the bulletin board as the two spoke. They went to the bulletin board area and Fiebich removed the other postings. Fishman recalled that he told Fiebich that he was going to continue posting union materials and that "if he was trying to change an Albertson's policy, he first had to notify my, the union and bargain over that change."

Fishman testified that he spoke on two occasions in September 1997 to Jackie Martini the Respondent's Western Oregon district manager when she was in the store. On the first occasion he told her that the store director had been taking down union materials he had been posting on the bulletin board. She told him she would look into it and get back to him. A week or two later he spoke to her again in the store. He asked her if she had information on the matter and she told him:

[S]he had talked to Dave [Fiebich], that she had asked him to talk to me about what they decided, that he would set aside an area on the bulletin board for union postings, and that I could not post newsletter clippings or documents naming members who are delinquent in paying their dues.

Q. Newsletters or newspaper?

A. Newspaper clippings.

Fishman testified that he told her in response that he was going to contact his union representative. Martini did not testify. Fishman testified he continued to post union-related items on the bulletin board and continued to observe personal items posted by other employees on the bulletin boards.

In late November 1997 in the break room, Fishman and other employees and Fiebich were present. Fishman testified he noticed that the bulletin board had posted items on it that Fishman had posted, as well as two issues of the Union's *Frontline* newsletter, he asked Fiebich if it was now okay to post the newsletters. Fiebich went to the bulletin board and took the newsletters and a copy of a workman's compensation study down leaving a union meeting notice posted. Nothing was said at this point by anyone. Fishman may have posted the workers compensation study, but did not believe he had posted the two particular issues of the union newsletter.

On or about December 1, 1997, Fiebich met with Fishman and told him, in Fiebich's memory, he was going to be written up. Fishman recalls that Fiebich told him he was going to receive a verbal reprimand because he posted the frontline articles and the worker's compensation study that were on his desk. Fishman testified that Fiebich told him that he had contacted Boise on the matter and they told him to issue the reprimand. Both agreed that Fishman said he wanted a union representative present and the conversation ended.

December 3, 1997, 2 days later, Fiebich met with Fishman and Local 555 Representative Dan Dugan. Fiebich's memory of the event was not complete:

I pretty much got right to the write-up at the beginning, and told Stuart [Fishman] that I was writing him up for not following Company policy on the posting on the bulletin board. He said that actually he had not put the newsletters up there. He had posted the other things, but not the newsletter, that Dan Dugan had put the newsletters up. . . . And which I wasn't aware of. I'd just assumed that Stuart had put the newsletters up also because all along it had—Stuart had been putting the stuff on the bulletin board. And Dan told me also that he was the one who put the newsletters up

Q. What else, if anything, did Mr. Fishman or Mr. Dugan say or you say in that meeting?

A. I can't recall anything that—after that.

Fiebich gave Fishman a "Documented Verbal Warning" which contained the handwritten entry in the section "Explain the violation or misconduct":

Violating Albertson's no solicitation policy. i.e.: hanging up your own brochures and newsletters. The Bulletin Boards are for store use only.

Fishman signed the form and entered the following:

Mostly Union brochures and newsletters. I disagree with the policy. I have a legal right to post under contract and NLRA. Also policy very confusing.

Fishman testified that the bulk of the conversation took place between Dugan and Fishman and that Fiebich took issue with the newsletter and report postings asserting that they put the Union in a good light. Dugan told Fiebich that the Union would file a grievance regarding the written verbal reprimand in this case even though the Union did not usually do that in such instances Fishman also recalled:

I told [Fiebich] that I had told other employees that he was removing documents that employees had posted on the bulletin board and that they were not happy with that, and he told me that if enough employees came to him and told him that he would contact Boise and see if they would change the policy.

Finally Fishman recalled that Dugan asked Fiebich for a copy of the no-solicitation policy and that Fiebich said he did not have it. Dugan them asked what it said and again Fiebich said he did not know. Dugan then asked where he could obtain the policy and Fiebich referred him to Boise.

Dugan specifically recalled asking Fiebich to explain what the Respondent's no-solicitation policy was and that he could not. Dugan then asked for a copy of the policy and Fiebich did not have one. Ultimately, he was referred to Boise for the policy. Fiebich testified that if asked for the policy he would have provided it.

Local 555 secretary/treasurer and grievance director, Ed Clay, testified that the Local regularly sends out copies of its newsletter, *Frontlines*, to store shop stewards for posting on store bulletin boards and that he has personally seen them posted there. He further testified that as grievance director he would have been made aware in monthly staff and weekly management meetings of any problems with posting of these publications and there had been no difficulty whatsoever save respecting Fishman.

(2) Analysis and conclusions

The General Counsel and the Charging Party argue that Fishman was clearly disciplined because he posted materials putting the Union in a good light, thus, incurring the store manager's disapproval. The Respondent argues that Fishman received a modest correction after repeated violations of a facially valid rule that had long been in place and had been uniformly applied for a long period and had been explained to Fishman more than 6 months before the discipline or the filing of the charge. The General Counsel and the Charging Party dispute these contentions.

Turning to the question of the rule, the threshold issue is whether or not the handbook policy is reasonably perceived as a rule respecting posting by employees. The handbook asserts: "Each store has a bulletin board on which current items of store business and special instructions are posted." I find that the existence of this language does not rise to the level of a restriction of employee conduct. I realize that King testified it was such and that she told store managers so. But the voluminous record herein makes it clear that the Respondent well knows how to make and distribute rules effecting employees. Further neither Fishman nor Fiebich knew of the rule. Finally and most importantly, setting aside Fishman, there is no evidence that an employee or the Union was ever informed of the rule as such at any facility of the Respondent represented by Local 555.

Even without a written restriction on employee conduct, the Respondent emphasizes the consistent conduct of management in removing "third party" materials. Thus, King testified it was her habit to remove employee nonbusiness postings. Fiebich also testified that, although it was not his highest priority, after learning of the rule from King he too removed nonconfirming postings. King clearly was not in every store with regularity. Fiebich clearly did not remove all the postings over any significant period. Again however, setting aside Fishman, there is no record evidence that King, Fiebich or any other agent of the Respondent ever instructed or corrected let alone disciplined an employee for such posting. Clay's testimony makes it clear that it is highly unlikely that any employee in the bargaining unit was ever disciplined for posting materials on the bulletin boards

I have found the handbook does not establish a "published" rule against nonbusiness postings. I further find the sporadic removal of postings described above also does not establish the publication of a rule against third party or nonbusiness postings. I therefore find that, save as discussed below at store #559 respecting Fishman, there was no such rule. This is so even if in fact King told managers there was such a rule, because there is no evidence that such a rule ever went beyond that stage. And, the record is clear that Martini, part of the Respondent's Oregon management, was not aware of the rule as King described it.

At store #559, there is no dispute that no rule was in place initially. Indeed Fishman had specific permission to post materials until those posted materials angered Fiebich and he initiated a telephone call to King. There is no doubt that King passed the rule to Fiebich and that Fiebich instructed Fishman to comply with it. The problem from the Respondent's perspective is that the rule was phrased in broad terms and critically it was announced and applied only to Fishman—the union steward—and to no other employee. The fortnightly or thrice monthly removals of postings by Fiebich does not constitute announcement of a no nonbusiness posting rule to other employees. Indeed it smacks more of simple bulletin board maintenance than the enforcement of a rule against posting.

A rule, which came into application at the store when management was inflamed by union postings⁶² and which was announced only to the store shop steward who was instructed to comply with it, is not a rule which may be used to justify adverse action against an employee for posting union materials. Analytically, it is not a rule published or applied to the employee compliment so much as a simple restriction and/or threat directed only to Fishman, the shop steward, as the poster of union materials. Such a restriction is a continuing violation and does not gain legitimacy because it has been repeated to the union agent for more than 6 months before the employee is disciplined for acting inconsistently. I note that this conduct is

⁶² There is no contention, nor would I find, that the posted materials were in some way scandalous or inflammatory and/or unprotected because of their content.

solely alleged as a violation of Section 8(a)(3) not Section 8(a)(5) of the Act. 63

Given all the above, and on the record as a whole, I find that Fishman was disciplined because he continued to post union literature on the bulletin board. I further find that the Respondent had no rule in place, communicated or applied to other employees which restricted that conduct and therefore the discipline violated Section 8(a)(3) and (1) of the Act. Complaint subparagraph 83(a) is sustained.

e. Complaint paragraph 84⁶⁴

Complaint paragraph 84 asserts:

About December 15, 1995, Respondent, by Dennis Lucas, at various locations within Respondent's Oregon Division, by-passed UFCW 555 and dealt directly with its employees in the Units described above in paragraphs 29-33 by issuing a December 15, 1995, memo to "Oregon Division Clerk and Meat Employees" referring to "UFCW Correspondence."

(1) Facts

The relevant agreement between Local 555 and the Respondent for Portland, Oregon area employees states at article 16:

The Employer agrees that there shall be no "free" or "time-off-the-clock" work under this Agreement. Any employee found by the Employer or Union to be engaging in such unauthorized practice shall be subject to discipline, which may include termination.

Some time after November 10, 1995, the Union distributed a blank questionnaire or survey form to its staff for use in interviewing Albertson's unit employees. The forms were designed to allow recordation of the information given by individual employees respecting details of their personal experiences respecting "off-the-clock" work. There is no record evidence beyond the content of the memo itself and the fact of its distribution respecting what, if any, other materials were distributed by the Union to employees.

On December 4, 1995, King wrote to President Ken MacKillop of Local 555. The letter states in part:

I have your December 1, 1995 letter. You state that the international union "recently made its local unions representing Albertson's aware of widespread allegations of off-the-clock-work." The international has told us about these allegations as well but hasn't given us any hard information. Please send me or Bruce Paolini whatever information the International has given you on this topic or which you may have learned about on your own. As Mr. Paolini stated in his November 10, 1995 letter, we're eager to identify any off-the-clock work or other employee problems and remedy them promptly.

. . . .

Please understand that our goal is to resolve employee problems promptly. We cannot do so if the UFCW continues to keep them a secret. I hope you will work cooperatively to resolve any employee violation our wage & hour policy.

MacKillop responded by letter of December 11, 1995, seeking, inter alia,

[A] commitment that no employee coming forward with a wage claim for working free time will be discriminated against, nor disciplined for working free time and/or filing a claim. Perhaps we could agree on a period of time for "amnesty" claims.

. . . .

We request that Albertson's inform us of all allegations and/or claims of free time that have been brought to the company's attention during the past six months, what steps the company took to remedy the situation, and what the final outcome of the matter was, including money paid and discipline imposed.

King in turn answered MacKillop with a letter dated December 13, 1995. The letter, inter alia, noted that the Union had not provided "the information it claims to have about employees violating our wage and hour policy." The letter's final paragraph asserts:

In response to questions we have not already addressed, we have and intend to continue to investigate and resolve off-the-clock work claims promptly. As we have said many times, we're willing to cooperate with Local 555 in the resolution of off-the-clock claims and exchange relevant information. In an effort to end this latter exchange and get the allegations about off-the-clock work which Local 555 claims to have, I suggest we meet and discuss this matter. Please provide your available dates in January.

On or about December 15, 1995, the Respondent's vice president of the Oregon division, Dennis Lucas, sent a memo, drafted by King, to at least all Oregon division clerk and meat employees represented by Charging Party Local 555. The memo states:

Several employees have given us a letter, survey form and booklet from the Portland UFCW Local dealing with allegations of employees working of-the-clock ("free time"). The letter falsely claims that Albertson's has an "illegal practice of coercing, pressuring, or inducing employees to work for free."

We want to set the record straight. <u>Albertson's does not want you to work off-the-clock</u>. [Underlining in original.] In fact we have an aggressive enforcement program designed to ensure that off-the-clock work doesn't occur. This program includes a notice on the time clock, periodic reminders to employees and surveys of the workforce as well as disciplinary action (including loss of bonus and/or discharge) for supervisors who allow off-the-clock work. We developed the program in cooperation with the U. S. Department of Labor.

⁶³ There was dispute respecting the implications of Fishman's status as an executive Board member and store steward on behalf of Local 555. I find it unnecessary to address the question given the analysis and conclusions above. It is enough that Fishman was engaged in posting of union materials and that was the action that triggered both Fiebich's original call to King and the issuance of a written verbal warning to Fishman.

⁶⁴ Complaint subpar. 83(b) was considered, supra.

The UFCW has threatened Albertson's with negative publicity because some of our employees have decided not to join the union. Our approach concerning unions is to honor employee free choice. Anyway, despite the UFCW threats and few off-the-clock complaints, we're trying to communicate with the UFCW to resolve any off-the-clock claim

As we said before, Albertson's is committed to providing employees with a workplace free of improper or illegal activities. If you have information about possible improper or illegal activities, including off-the-clock work, please report it to your district manager (at [phone number omitted]), or our General Office by calling our toll free Hotline number ([Phone number omitted]) which is available 24 hours a day. You need not identify yourself to make a report via the Hotline.

As far as the union's survey, you are of course free to complete it. We'd appreciate your sending our Labor Relations Department ([mail address omitted]) a copy of any written survey or information you give the UFCW so we can investigate it and resolve it quickly. We promise that the information you provide will be thoroughly and objectively investigated and appropriate corrective action taken. We guarantee that no employee will be retaliated against for raising an allegation of off-the-clock work.

Thanks again for your hard work during the storm and all of your other efforts to make us successful. Best wishes for the Holiday Season!

(2) Analysis and conclusions

The complaint alleges the Respondent through the abovequoted memo to employees "bypassed" Local 555 and "dealt directly" with employees in violation of Section 8(a)(5) of the Act. The Board in *Permanente Medical Group*, 332 NLRB 11143 (2000), stated:

[T]he criteria to be applied in determining whether the Respondent has engaged in direct dealing under Section 8(a)(5) are enumerated in *Southern California Gas Company*, 316 NLRB 979 (1995). They are: (1) that the Respondent was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the Union.

This black letter exposition provides a useful analytical framework with which to consider the instant allegation.

There is no dispute that the memo under challenge was a direct communication to union represented employees. Indeed unlike the situation in some of the cases where all an employers' employees both represented and unrepresented are consulted regarding a matter, the memorandum involved here was directed solely to the represented employees and did not even include the unrepresented employees in the stores where the represented employees were sent the memo. The memo concerned a matter solely of interest to represented employees.

The wording of the second quoted criterion: "the discussion was for the purpose of establishing or changing wages, hours,

and terms and conditions of employment or undercutting the union's role in bargaining," illustrates the context sensitive nature of the analysis in this area. The "discussion" involved herein was not one respecting solicitation of preferences respecting future working conditions or polling of employee desires respecting future collective-bargaining terms. Rather the subject of the memo was the solicited employees reporting and the Respondent's promised prompt investigation and remedy of past contract violations and/or violations of wage and hour laws respecting pay for work. While the language of the criterion does not apply without a certain flexible view, the memo deals with the change of past working conditions, i.e., the remedy of previous unpaid or off-the-clock work by, presumably, the relief of appropriate retroactive compensation. In this sense the memo does in fact have a purpose in changing wages, i.e., compensating employees for missed wages.

The parties disagreed strongly respecting whether or not the memo was for the purpose of "undercutting the union's role in bargaining." Again the Board's quoted language is addressing a different factual context. The prebargaining or planned modernization change setting in which the cases often arise does not match the current situation which, although involving represented employees, has aspects of the cases which arise in the organization drive setting where the employer's actions are under unfair labor practice challenge for soliciting employee grievances and promising to remedy them.

The Respondent argues that it is not a violation of the Act for an employer to, as *Southern California Gas*, supra, teaches, "learn about its own business" and "manage knowledgeably." Indeed the Respondent argues that it is clearly its duty and responsibility as a responsible employer to insure that Federal and State laws and the terms of the collective-bargaining agreement are complied with.

The Respondent filed a series of Motions to Dismiss on March 16, 2001. On April 17, 2001, I issued an Order addressing a motion dealing with the instant allegation. That ruling addressed various parts of the memorandum and held in part:

The instant memo informs its employees of its policies generally and its abhorrence of and aversion to its employees undertaking off-the-clock work. Such direct communications are proper and are not under challenge by the government. The memo further makes it clear however that the Respondent is requesting all employees with grievances or information concerning grievances involving off-the-clock work to report them to the Respondent. Even this portion of the memo is quite generic in its admonition to employees to report violations of this rule. . . . In all events, I would not find a memo limited to such a general admonition to violate Section 8(a)(5) and (1) of the Act.

In effect, I ruled that the memo, without its fifth paragraph, would not rise to the level of a violation of the Act. The General Counsel and the Charging Party do not challenge that ruling herein. The focus of the analysis therefore deals with that fifth paragraph informed by the memo in its entirety and the broader context in which it arose.

The General Counsel and the Charging Party emphasize that the Respondent's memo was neither distributed, nor by its terms directed, to employees generally but rather was sent to and focused exclusively on the represented employees that the Respondent knew had been contacted by the Union respecting its off-the-clock work and the memo's fifth paragraph is directed to those employees who had submitted information to the Union. The memo itself makes this plain. The General Counsel and the Charging Party emphasize further that the information sought by the memo in the fifth paragraph is not general information respecting employee work off-the-clock, but rather, and in specific terms, the information and/or copies of surveys that the employees had given the Union. Finally, the Government and Local 555 draw attention to the twin facts: (1) that the memo repeatedly attacks the Local, questioning the motives of the Union in dealing with the off-the-clock matter and (2) that the memo specifically promises to quickly resolve any matter that the employees had reported to the Union and further promises "appropriate corrective action" will be taken respecting that information, if the employees will provide it to the Respondent.

The moving parties point out that the memo treats the information it solicits in two distinct and significantly different ways. The Respondent asks in paragraph four for general information regarding off-the-clock work without asserting what the Respondent would do with the information reported:

If you have information about possible improper or illegal activities, including off-the-clock work, please report it.

But in the fifth or penultimate paragraph of the memo the Respondent specifically solicits information given to the Union and in the same sentence promises quick action. Thus:

As far as the union's survey, you are of course free to complete it. We'd appreciate your sending our Labor Relations Department ([mail address omitted]) a copy of any written survey or information you give the UFCW so we can investigate it and resolve it quickly. We promise that the information you provide will be thoroughly and objectively investigated and appropriate corrective action taken.

This clearly demonstrates, the General Counsel and the Charging Party argue, that the focus and impact of the memorandum was not to assist the Respondent, but rather was to undermine the Union by attacking its handling of the issue, creating the impression among employees that providing information to the Union alone was not effective and—if the employees would only give to the Respondent what they had given to the Union—promising to do better and act faster in providing relief to the employees who had gone to the Union. The General Counsel and the Charging Party conclude that this conduct is clearly objectively viewed as focused antiunion undermining activity clearly violative of Section 8(a)(5) of the Act.

Based on all the above and the record as a whole, I make the critical factual finding that the memorandum, as the General Counsel and the Charging Party argue, is not the benign effort of an employer seeking to make things right. Rather, based on the elements described above as argued by the General Counsel and the Charging Party, and rejecting the contrary arguments of the Respondent, I find the memo was focused on obtaining

information that had been submitted to the Union respecting off-the-clock work and did so in a context of both criticizing the Union's good faith and bonafides and making promises of a quicker and implicitly better remedy for all employees who sent the Respondent the material and information they had given the Union

Such conduct both undermines and excludes the Union from the off-the-clock hours investigation process and constitutes the heart of a direct dealing violation. Accordingly, I find the memo violated Section 8(a)(5) and (1) of the Act. The complaint allegation is sustained.

4. Complaint paragraph 79

Complaint paragraph 79 asserts:

(a) At all times material herein, Respondent has maintained the following rules in effect for all of its employees, Employer-wide, as set forth in a document entitled "Company Personnel Policies:"

(i)

III. DRESS AND APPEARANCE:

3. All store employees must wear uniforms or aprons as provided or other clothing with name badges on the left chest. No other badges or pins shall be worn unless authorized by the Store Director.

(ii)

VIII. GIFTS, TIPS AND SOLICITATIONS:

- 2. In the interest of preventing disruption of customers and employees, Albertson's has established no solicitation rules:
- a. Non-employees: Solicitation and distribution of literature or information on company premises by anyone not employed by Albertson's is strictly prohibited.

(iii)

X. IMMEDIATE DISMISSAL WITHOUT PRIOR WARNING:

There are certain types of conduct that may warrant immediate discharge. Examples of such conduct are (this list is not meant to be all-inclusive):

11. Disclosing confidential information or any other similar act constituting disregard for the Company's best interests.

. . .

- 16. Off the job conduct which could have a negative effect on the Company's reputation or operations.
- (b) At all times material herein, Respondent has maintained the following rules in effect for all of its employees, Employer-wide, as set forth in a document entitled "Retail Stores Orientation and Policy Handbook."

(i) SOLICITATIONS

Non employees may not solicit, distribute literature or use sound devices on Company premises at any time.

(ii) OTHER RULES

The following are some examples of conduct, which will subject employees to immediate discharge:

j. Disclosing confidential information or any other similar act constituting disregard for the Company's best interest

. . . .

- n. Off-the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity.
- r. Any other misconduct which, in the Company's judgment warrants immediate discharge.
- (c) Respondent promulgated and maintained the rules described above in paragraphs 79 (a) and (b) to discourage its employees from engaging in protected, concerted, union activities.

The complaint at paragraph 85 alleges these rules violate Section 8(a)(1) of the Act.

The parties stipulated that the quoted personnel policies were distributed to Albertson's retail store employees in its southern and western region and maintained in force in those areas. It is appropriate to deal with the rules under challenge as follows.

a. The no badges or pins without authorization rule

The rule states:

All store employees must wear uniforms or aprons as provided or other clothing with name badges on the left chest. No other badges or pins shall be worn unless authorized by the Store Director.

This rule has been in place for many years without amendment. It is part of the Respondent's rules which are provided employees and which apply to all retail store employees. The General Counsel challenges the language as a per se or facial violation of Section 8(a)(1) of the Act without contending that it has been applied in any particular situation in a way that independently violates the Act.

The Respondent makes a threshold argument that the Board may not prosecute the instant complaint "union button" allegations. Thus, it argues that the allegation was "subject to two prior Board decisions, [and] is barred by the doctrine of collateral estoppel and res judicata." (R. Br. sec. III, phase II cases, complaint par. 79 (Badge Rule) at 1.) The Respondent argues that a rule prohibiting union buttons was found overbroad by the Board in *Albertson's*, *Inc.*, 272 NLRB 865, 866 (1984), which held:

In this case, we conclude that the Respondent's restriction of buttons is unlawfully board because it applied to nonselling as well as selling areas of the store and applies to employee break time as well as time when employees are working. Accordingly, we find that the rule constitutes an unreasonable impediment to employee union activity and a violation of Section 8(a)(1).

Thereafter the Respondent argues, it modified its rule to apply only in nonselling areas when employees are working. This modified rule was challenged in a second Board case: *Albertson's, Inc.*, 300 NLRB 1013, 1015 (1990), which found a violation of Section 8(a)(1) of the Act. The United States Court of Appeals for the Ninth Circuit in an unpublished decision found the Board's 1984 decision "impliedly upheld" the original blanket button ban as applied to "non-selling areas" and that the Board was therefore estopped from finding the rule violated the Act. The court therefore denied enforcement of the 1990 Board

Order insofar as it found a violation of the Act in the application of the rule.

Thereafter, argues the Respondent, a third Board case, *Albertson's*, *Inc.*, 319 NLRB 93 (1995), issued. In that decision the administrative law judge noted, at 102:

The record reveals that for at least 13 years Respondent has maintained in effect a document, entitled "Company Personnel Policies." which sets forth each of Respondent's employee personnel policies, a copy of which is given to each new employee at the time of hire, and of which the new employees are required to acknowledge receipt by executing the document. Section 3 of the dress and appearance provision of the personnel policies states that "all store employees must wear uniforms or aprons as provided, with name badges on the left chest. No other badges shall be worn unless authorized by the Store Director.

The Respondent argues that the quoted rule was "before the judge, but was not found unlawful." (Br., supra at 6.). And the Respondent notes that the judge in *Albertson's*, 319 NLRB at 103 fn. 44, found the court's language denying enforcement of 300 NLRB 1013 was irrelevant to 319 NLRB 93 because the only rules before him prohibited employees from wearing pins and buttons in any area of the stores at any time as opposed to restricting the wearing of insignia in the selling areas of the stores.

Respecting the merits of the allegation, the General Counsel and the Charging Party argue that the Respondent improperly invokes the doctrine of collateral estoppel. The court's decision held that the rule applied in the volume 300 Board decision insofar as it applied to selling areas and work time had arguably been approved in the volume 272 Board decision, but the instant case deals with the propriety of a rule admittedly applicable to selling and nonselling areas and working and nonworking time and is, therefore, simply unaffected by the court's holding. Rather, argues the Charging Party, the Respondent here is atavistically returning to the broad prohibitions of its earlier illegally broad rule applicable to all times and places found violative by the Board in 1984 and 1995.

The General Counsel and the Charging Party argue that the rule is very broadly written to require authorization for all badges or pins without limitation or distinction respecting the type size or nature of the item. So, too, they argue that the rule applies to all retail store employees irrespective of their contact or non-contact with members of the shopping public. The Union further argues the rule does not distinguish between employees at work or on their own time nor does it distinguish between work and nonwork break or lunch areas.

The General Counsel argues that it is longstanding Board doctrine that absent special circumstances, the wearing of union pins and buttons or other insignia is activity protected by Section 8(a)(1) of the Act citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). Counsel for the Charging Party cites *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), and the General Counsel *Raley's, Inc.*, 311 NLRB 1244, 1245 (1993), for the proposition that the burden of justifying a restriction on employees wearing union badges or pins lies with the employer. They further ar-

gue that, where there is no evidence supporting or consistent enforcement of the rule, the rule violates the Act citing *Albertson's, Inc.*, 319 NLRB 93 (1995). Finally, the General Counsel notes that the Board has consistently held that requiring employees to obtain management permission to engage in protected activity, including in the context of wearing union pins and buttons in retail stores, violates the Act equally. *Albertson's, Inc.*, supra; *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988).

It is appropriate to deal initially with the Respondent's collateral estoppel and res judicata arguments. The Respondent argues that the instant challenge to the "no badges or pins without authorization" rule is precluded by the Board's decisions reported at volumes 272 and 319. I agree with the General Counsel that the 272 Board decision does not limit the General Counsel's complaint herein. The circuit court of appeals in denying enforcement to the volume 300 decision found that, in effect, the Board in its earlier volume 272 holding that a rule against wearing union buttons which was not limited to selling areas or worktime violated the Act impliedly approved a rule against union buttons limited to selling areas and worktime. The instant complaint allegation deals once again with a rule that applies broadly to all areas and times without limit and is thus distinguishable.

The Respondent argues that the Board's volume 319 decision considered this rule and did not find it a violation of the Act. In effect it argues that the volume 319 Board decision estoppes the Board from finding the same rule a violation of the Act now as the Court found respecting the volume 272 Board decision's effect on the volume 300 decision. I have read closely the Board's decision in Albertson's, Inc., 319 NLRB 93 (1995), in which the Board in relevant part herein approved Administrative Law Judge Burton Litvack's decision. I disagree with the Respondent and find that the Board's decision explicitly finds the rule at issue herein to be a violation of Section 8(a)(1) of the Act and directs that it not be maintained or enforced. Thus, in my view, the 319 Board decision is rather res judicata for a violation of the Act and is not a basis for finding the instant complaint allegation is limited in consequence of the earlier holding.

Judge Litvack's decision is not crystal clear on the point due to the existence of other union button memoranda in the case and the fact that past practice had apparently been inconsistent with the personnel policy provisions. See, e.g., id. at 103 fn. 44. However, even if the decision is ultimately determined not to have held the personnel policy involved herein violative, the 319 Board decision certainly did not expressly, impliedly, or even arguably, approve it. Therefore, under any reasonable interpretation of the 319 Board decision it does not support the Respondent's argument.

Given the above and based on the entire record, I find there is no estoppel or res judicata basis for dismissing the instant complaint allegation.

Having dealt with the threshold arguments, it is appropriate to turn to the complaint allegations merits. I agree with the government and Charging Party's argument and representation of Board law applicable to union apparel rules. The rule is overboard in that it applies without distinction to employees in

all settings and situations. There is no evidence respecting its application nor the "special circumstances" that might justify its existence in certain situations. The Respondent bore the burden of putting on such evidence.

Given the rule, the record as a whole, and the cases cited, I find the rule improperly restricts employees protected activities in violation of Section 8(a)(1) of the Act. This portion of the complaint is sustained.

b. The no-solicitation rules in California

In the interest of preventing disruption of customers and employees, *Albertson's* has established no solicitation rules:

a. Non-employees: Solicitation and distribution of literature or information on company premises by anyone not employed by Albertson's is strictly prohibited.

(i) SOLICITATIONS

Non employees may not solicit, distribute literature or use sound devices on Company premises at any time.

The General Counsel argues that in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the United States Supreme Court upheld the decision of the California State Supreme Court that the California State Constitution provided labor organizations rights to picket and present their views in shopping centers. This right, counsel for the General Counsel argues, also applies to privately owned sidewalks of standalone grocery stores such as the Respondent's. *Lane*, 457 P.2d 561 (Cal. 1969).

She further asserts that the Board requires respondents to establish an interest entitling it to exclude individuals from its property. *Indio Grocery Outlet*, 323 NLRB 1138 (1997). The Respondent herein has not established a property interest sufficient to justify policies "which enjoin the distribution, on company premises, of all literature or information, including union literature and information." (GC Br. at 43.) The General Counsel concludes that the Respondent's policies are therefore on their face a violation of Section 8(a)(1) of the Act because they unlawfully restrict Section 7 activity outside the Respondent's California stores.

The Respondent makes several arguments. First, the Respondent argues that the rule simply does not violate the Act, irrespective of the arguments of the General Counsel, because its rule "can hardly chill employee rights because it does not even apply to employees. Moreover, the rule is not distributed to non-employees and there is no evidence that non-employees are aware of it." (R. Br., sec. III, phase II cases, complaint par. 79 at 5.) I reject this argument because, if the rule is an impermissible restriction on picketing and union organizing nonemployees as the General Counsel contends, that restriction in fact chills the Section 7 rights of employees by denying them the legitimate support of nonemployees. And, as in Ark Las Vegas Restaurant Corp., 335 NLRB 1284 (2001), cited by the Respondent, the Board does examine rules restricting nonemployee activities for their potential to violate employee Section 7 rights.

Turning to the rules themselves, the Respondent argues that the rules are concededly valid in 49 States and that, in California, the special circumstances arising from the developing case law applying the California Constitution need only be considered when a nonemployee has actually been excluded from the property. Thus, the Respondent argues, unless and until such a situation presents itself—and there is no contention that one has taken place, the rules restricting nonemployees must be considered valid. I do not accept this argument because, as a general matter, a rule is not exempt from at least facial examination simply because it has not been applied. Thus, I find the General Counsel is not foreclosed from challenging the rule as a violation simply because the rule has not yet been applied.

The Respondent makes two different arguments turning on the facts that the General Counsel's attack on the rule is general, applies to the entire State of California and does not deal with specific stores or specific acts of restriction or exclusion. First, the Respondent argues:

No post *Lechmere* court or Board decision has found that, on its face and without a specific denial of speech, a neutral rule prohibiting non-employee solicitation violates Section 8(a)(1). Under these circumstances, *Lechmere* [502 U.S. 527 (1992)] and *Babcock* [351 U.S. 105 (1956)] do not require a consideration of state law and there is no need to enter into the quagmire of California *Pruneyard* jurisprudence. (R. Br., sec. III, phase II cases, complaint par. 79 at 3.)

I find, contrary to the Respondent, that consistent with the Board's teaching in its California cases in this area, the necessary analysis must take into account the property rights and access law of that State. I do not find the analysis must avoid California law.

The Respondent's further argument in this area rises from consideration of California law. The Respondent argues that the General Counsel, by alleging the Respondent's no-solicitation rules for nonemployees are facially violative of the Act and refraining from offering any evidence whatsoever respecting a California premises or an actual event or circumstance, has failed to establish that the rule is overbroad. Thus, the Respondent argues that the burden is upon the parties claiming access to property, here the Government which claims an over-broad restriction on access, to establish a panoply of factual prerequisites such as:

[T]hat the property owner has provided the public with free and unrestricted access to its property and that the property has taken on the characteristics of a traditional public forum [citation omitted]." (R. Br., sec. III: phase II cases, complaint par. 79 at 3.)

The Respondent's argument continues:

Such a challenge involves an evaluation of the property involved, how it is used by the property owner and local community, and what the surrounding area is like. Any evaluation under California law must also require an evaluation of the proposed communication activities and whether reasonable time, place, and manner restrictions have been imposed. [Citations omitted.]

Here, the General Counsel has failed to present any evidence establishing that any Albertson's premises have taken on the characteristics of a public forum under *Pruneyard*.

In effect, the Respondent's argument goes, the General Counsel having failed to meet his evidentiary burden, may not argue that the rules are overbroad.

The issue of who has the burden in this situation is at the heart of the parties disagreement. The General Counsel's cited case, *Indio Grocery Outlet*, 323 NLRB 1138 (1997), is a California State grocery store case dealing with the employer's right to limit nonemployee union agents. In that case the Board held, consistent with earlier cases, that the respondent, not the General Counsel, bears the threshold burden to establish that it has an interest which entitled it to exclude organizers or limit such individuals activities on the property. I therefore find that it is the Respondent herein, and not the General Counsel who bears the burden and who has failed on this record to establish such a right.

The Respondent is correct that in Calkins, supra, and other cases the balancing of rights that occurs as of the time that an individual was expelled from the respondent's property or whose activities were then prohibited or restricted. The Respondent is also correct that a rule that has not in fact been applied to a particular location, situation or activity, simply cannot be tested as the Board and courts have done in Calkins and the many other cases in which such interests are balanced. As discussed supra, the Respondent argues that this inability should weaken, if not defeat the General Counsel's argument. I find to the contrary. Thus, I find that, where a rule against Section 7 activity is not susceptible to a fair determination of whether or not it violates statutory rights, unless, or until it has actually been applied to a specific situation, that rule is by virtue of that simple indeterminacy, overboard, and improperly chilling of statutory rights. If a rule's validity in limiting protected activity must be determined only in its application, it is overbroad. Such over breadth is itself a fatal weakness in the instant rule within the State of California.

Based on the record as a whole and the arguments of the parties, I find the General Counsel has sustained his burden with respect to the no-solicitation allegations of complaint paragraph 79. The Respondent by maintaining the rules in the State of California as set forth above, has violated Section 8(a)(1) of the

F. The Other Rules

OTHER RULES

The following are some examples of conduct, which will subject employees to immediate discharge:

j. Disclosing confidential information or any other similar act constituting disregard for the Company's best interest

n. Off-the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity.

r. Any other misconduct which, in the Company's judgment warrants immediate discharge.

. . . .

The Respondent filed a motion to dismiss this allegation on March 16, 2001. On April 7, 2001, I issued an order on the motion and others finding, inter alia, that the motion to dismiss was inappropriate because it was necessary to evaluate the complaint allegation in light of my findings and conclusions respecting the entire case. I now consider the arguments of the parties made at that time and on posthearing brief in light of record as a whole and my findings and conclusions respecting the entire complaint herein.

In its motion and on posthearing brief the Respondent notes that the General Counsel contends that these rules are facially violative of the Act and does not contend that they were promulgated in response to protected activities. Facial violations of this type, argues the Respondent, are squarely addressed in two Board cases: *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), which have found rules of the type under attack here not to violate the Act. The Respondent further cites *Super K-Mart*, 330 NLRB 263 (1999), and *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (2001), as offering further support for dismissal.

The Respondent's cited cases hold that confidentiality rules or other broad employee conduct rules must be considered in context and as a whole respecting whether the rules would reasonably tend to chill employees in the exercise of Section 7 rights. The cited cases found that rules like the confidentiality rule of the Respondent did not violate the Act.

The General Counsel and the Charging Party disagree that the cited cases are dispositive and urge that the "other" rules be found violative in light of the entire course of conduct litigated in the instant complaint. The General Counsel also points to several Board cases in which the Respondent has been found in violation of the Act for maintaining overly restrictive rules respecting union buttons and no solicitation no distribution rules.

As discussed in part in my ruling on the motion for dismissal, I view the recent developments in the case law in this area starting with *Lafayette Park Hotel*, supra, as a retrenchment from earlier cases. I find the rules under attack herein are sufficiently close to those in *Lafayette Park Hotel* and the other cases cited and are subject to the same analysis and result when viewed in isolation. Thus, without adding the broader context to the balance, I would find no violation and would dismiss this allegation.

The broader context advanced by the moving parties as dispositive herein comprises the Board and court cases the General Counsel cites in which the Respondent has been found to have violated the Act by improper rules and the violations found in the instant case. The relevant allegations within the instant case comprise the pattern and practice allegations, the individual allegations concerning protected activity and the wrongful application of the confidentiality rule to Mary Ford as alleged in complaint subparagraph 83(b) and considered and discussed supra. I found that complaint allegation 83(b) as to Ford was meritorious and that the confidentiality rule was used to discipline Ford because she had supplied a work schedule with employees names on it to the Union in the course of an organizing drive.

The General Counsel and the Charging Party's context, pattern and practice and proclivity arguments are significant on this record and make the question of the validity of the "other" rules as alleged a close question. In particular I find significant the Respondent's use of the confidentiality rule to discipline Ford for giving to the Union a document of the type that was regularly on posted bulletin boards where union officials might observe them and when union officials had regularly been given represented employees' schedules. And, as part of this disciplinary process, the Respondent announced to other employees that Ford's actions were improper and in violation of the Respondent's rules.

Considering all of the above, including the fact that in isolation I would find the rules to pass current Board muster, I find that the "other" rules in the context of the entire record as discussed above, violate Section 8(a)(1) of the Act as alleged. In isolation the rules do not chill employee-protected activities. However, when the analysis is informed by the context of the Respondent's actions at relevant times, including the history of improper restriction of employees' Section 7 rights both historically as discussed supra and herein, I find they in fact do. I therefore sustain complaint paragraph 79(b)(ii).

THE REMEDY

The instant case involves numerous unfair labor practices and a very large number of fact-rich situations and circumstances spanning a period of months and years, several States and many locations within those States. The parties vigorously litigated these allegations in a trial involving literally not years, but decades of attorney labor, tens of thousands of pages of transcripts and exhibits and thousands of pages of submitted motions, argument, and briefing as well as dozens of written orders, numerous interim appeals, and collateral Federal court proceedings. While the unfair labor practices alleged in their totality were the significant factor in the trial, the remedy sought by the Government, and the litigation of the matters relevant to it, were a dominating undercurrent, generating substantial evidence and argument, stimulating passions, raising the stakes and generally broadening the issues in litigation respecting all the allegations.

I. RELIEF SOUGHT

The normal Board remedy for information provision violations of Section 8(a)(5) of the Act is an order providing for the provision of the information, if it has not been provided and is still under request, and the posting of an appropriate remedial notice. Violations of Section 8(a)(3) or of Section 8(a)(1) of the Act involving discrimination against employees are normally remedied by an order requiring rescission of the wrongful discipline or rule and posting of an appropriate remedial notice. Violations of Section 8(a)(1) not involving wrongful adverse actions are also traditionally remedied by notice posting and recission of wrongful rules. Typically, a single case involves only a single location and a notice is posted only at that location. Multilocation violation notice postings often involve either a single broadly written notice or individually customized notices to be posted at each facility. The Board has a body of decisional law respecting notice remedies and has recently

emphasized clarity and simplified language in notices to employees over the sometimes stilted legalisms of old.

The Board provides for extraordinary remedies in various situations. The General Counsel and the Charging Parties seek such a remedy in the instant case. The General Counsel's complaint asserts:

WHEREFORE, in view of the extensive and repeated course of conduct and pattern of unfair labor practice violations engaged in by authorized agents and representatives at and within Respondent's centralized Boise, Idaho corporate Labor Relations organization, which conduct affected employees at facilities throughout Respondent's numerous geographic divisions; and in view of the similarity of the current allegations set forth herein and prior violations by Respondent as previously found by the Board and the Courts, the Acting General Counsel seeks the following remedial relief:

A. With respect to paragraphs 5(b)–(i), 57–63, 65–77 and 84 of this Third Amended Consolidated Complaint, an Order which applies to Respondent's Boise, Idaho corporate offices, Respondent's retail stores, distribution centers and other individual facilities whose labor relations functions fall within the operational oversight and jurisdiction of Respondent's Boise, Idaho corporate offices as they exist as of the date of the issuance of the Consolidated Complaint and Notice of Hearing, or as may be restructured, and which Order will also apply to any facilities whose labor relations are subsequently brought within the operational oversight and jurisdiction of such Boise corporate offices, which requires Respondent to, inter alia:

- cease and desist from any and all conduct found unlawful under the National Labor Relations Act in this proceeding;
- (2) furnish the information requested by the duly designated collective-bargaining representatives of its employees as set forth in this Third Consolidated Complaint, which has not otherwise been provided;
- (3) upon request revoke any and all unilateral changes made by Respondent;
- (4) cease dealing directly with its employees who are represented by a duly designated collectivebargaining representative;
- (5) (recognize and bargain collectively with the duly designated collective-bargaining representative of its employees at the appropriate stores.
- B. With respect to the allegations set forth above in paragraphs 79(a)(i)(iii) and (b)(ii), and paragraphs 81 and 82 of this Third Amended Consolidated Complaint, the Acting General Counsel seeks an Order which requires Respondent to cease and desist from any and all conduct found unlawful under the National Labor Relations Act, with the scope of such Order employer-wide, and not limited to Respondent's facilities whose labor relations functions fall within the operational oversight and jurisdiction of Respondent's Boise, Idaho corporate offices as set forth in paragraph A above. In addition Respondent should be required to expunge the unlawful rules as set forth in para-

graph 79(a)(i)(iii) and (b)(ii) of this Third Amended Consolidated Complaint and to so advise all of its employees.

- C. (paragraph deleted)
- D. With respect to the allegations set forth in paragraphs 79(a)(ii) and (b)(i) of this Third Amended Consolidated Complaint, the Acting General Counsel seeks an Order which requires Respondent to cease and desist from any and all conduct found unlawful under the National Labor Relations Act with the scope of such Order applying only to Respondent's facilities located in California. In addition Respondent should be required to expunge the unlawful rules as set forth in paragraph 79(a)(ii) and (b)(i) of this Third Amended Consolidated Complaint and to so advise all of its employees.
- E. An Order requiring Respondent to immediately distribute, at Respondent's expense, and post in conspicuous places at Respondent's general offices located in Boise, Idaho and at all retail stores, distribution centers and other individual facilities, where notices to employees, officers and members are customarily posted, the specific Notice or Notices to Employees that may issue in this proceeding which apply to each of Respondent's retail stores, distribution centers and other individual facilities; and immediately mail at Respondent's expense sufficient signed copies of said notice or notices to the Board's Regional Director for the Twenty-Seventh Region for posting by collective-bargaining representatives at their offices.
- F. An Order requiring the Respondent to cease and desist from violating the National Labor Relations Act in any other manner.
- G. An Order requiring the Respondent to provide to all current labor relations attorneys, representatives, contract administrators, and all Store Directors, assistant Store Directors, and supervisors, and to all persons hired or appointed to such positions for a period of five (5) years from the date of the Board's Order in this matter, a copy of the Board's Order and Notice (and any Court judgment that may subsequently enter enforcing said Order) and require each such individual to certify in writing that they have read and are familiar with the terms of the Board's Order and Notice (and any Court judgment that may subsequently issue). Respondent shall maintain, and provide upon request, copies of said certificates to agents of the Board for a period of five (5) years from the date of the Board's Order. Respondent shall further direct all such individuals to comply with the provisions of said Order (and Court judgment that may subsequently issue).
- H. An Order requiring that Respondent file with the Regional Director for Region 27, in writing, within 21 days from the date of this Order, a sworn certification of a responsible official on a form provided by Region 27, attesting to the steps that the Respondent has taken to comply therewith.

Finally, the Acting General Counsel seeks other relief as may be appropriate to remedy the unfair labor practices alleged.

The Charging Party Teamsters Local 537 further seeks an order requiring the Respondent:

- 1. To furnish, within 15 days of receipt of an information request, all information the union has requested that is relevant and necessary to the investigation and processing of grievances, including an and all documents relating to the information request, and if any information is not available or cannot be provided within 15 days, to provide the reasons why the information is not available.
- 2. To provide a response, when responding in accordance with the contractual requirement to respond in writing within 15 days or receipt of a grievance, that includes the substance of the Company's position on the grievance, as well as a statement of the facts and contentions relied upon in support of such position.
- 3. To notify the Teamsters promptly when, in Respondent's opinion, it does not have relevant documents or additional information responsive to the union's request.
- 4. To notify the Teamsters or ask for clarification promptly when Respondent believes that the Union is limiting a request for information to an explanation of Respondent's reasons for an action or limiting a request in some other manner.
- 5. In regard to information request by the Teamster in 1995 and 1996 that Respondent still has not provided, to provide such information immediately, e.g., within 15 days, after the Teamsters notify Respondent in writing that the Union is still seeking such information.
- 6. To provide T-Put planners promptly when they are requested by the Teamsters or, if Respondent's confidentiality interest is found to be legitimate and substantial, to bargain immediately with the Union for accommodation of such interest, with the specific understanding that T-Put planners will be disclosed to the union with assurances of confidentiality. [Citation of authority omitted.] [Teamster's brief at 656.]

II. ARGUMENTS OF THE PARTIES

The Charging Parties support the General Counsel's proposed remedy and the proposed remedy of the Teamsters. The Respondent opposes all proposed special or extraordinary remedies and further disputes the factual and legal bases on which they are predicated.

The General Counsel, with the Charging Parties' support, makes a two-fold argument in support of his proposed extraordinary remedy.

First, it is premised on Respondent's centralized corporate control of labor relations at all levels of Respondent's organization. More particularly, as the record evidence establishes, all of the unlawful conduct alleged in this consolidated complaint was committed by persons who were employed in Respondent's Boise corporate office and who functioned in a organizational system where corporate officials controlled, directed and carried out the activity that underlies the unfair labor practices litigated herein. Second, Respondent's recidivist history of violating the National Labor Relations Act justifies the General Counsel's request for an extraordinary remedy in these cases. (GC Br. at 389.)

Because the remedies in contention herein are advanced and opposed based on disputed characterizations of the Respondent's Boise-based labor relations department's relationship to the Respondent's stores and distribution centers as well as its internal organization and dynamics, it is appropriate to first address those contentions and thereafter deal with the argument respecting specifics of the remedy to be directed herein.

A. Centralized Control—The Respondent's Boise, Idaho Labor Relations Department

As discussed in various degrees in the resolution of the numerous allegations supra, the Respondent is headquartered in Boise, Idaho. At relevant times its retail stores that are located nationwide were organized into the southern and western regions. With the exception of the chainwide retail store personnel policy allegations, the allegations of the complaint deal with events occurring exclusively within the western region. The western region is organized into the following divisions: Idaho (including eastern Oregon), Inland Empire (including Montana, eastern Washington, and Idaho panhandle), western Washington, Oregon, northern California, southern California, Utah, Southwest (including New Mexico, Arizona, and El Paso, Texas), and Rocky Mountain (including Colorado, Wyoming, and South Dakota). Each division has its own management structure to which retail stores report.

In the mid-to-late 1990s, the labor relations department in Boise assisted and advised the operating divisions with labor relations matters which included processing grievances and arbitrations, negotiating agreements, and advising management respecting store and distribution facility labor relations matters. While specific titles varied somewhat, the labor relations department was staffed by labor relations attorneys (sometimes called directors), contract administrators, and clerical support staff. Each western division was assigned at least one labor relations attorney although in some cases attorneys handled more than one division. Contract administrators generally were assigned to assist a particular labor relations attorney. Since 1999, as a result of a merger, as least some labor relations department staff servicing California have moved to that State and the department is no longer solely based in Boise.

The record suggests that the labor relations department professional personnel generally did not rotate from their divisional or team assignments within the department on a day-to-day, a fill in, or an as needed basis. Thus, setting aside formal transfers or some temporary assignments, the staff assigned to particular divisions carried the load of that division and did not regularly or easily draw on the other professionals in the department for fill in or overload assistance. And, while there was professional turnover within the department, there were also individuals who served for substantial periods of time assigned to and handling issues for particular operating divisions.

The Respondent, primarily through the testimony of Labor Relations Attorney Scoggin, described the Respondent's corporate philosophy as being operating unit based with the various operational officers of the individual operating divisions having essential operational control and not corporate management. This field management control allowed and encouraged decentralized, local control. Inevitably, over time the autonomous

units evolved differences in practices between divisions that developed as adjustments were made to local conditions. Even in labor relations matters such as the procedures for the handling of grievances came to differ by division and by contract.

The Respondent further argues the labor relations department, in like vein, did not make decisions respecting labor relations matters, but rather were advisors and consultants to divisional management or store and distribution center management. Thus, they simply discussed, advised, and recommended courses of action. The ultimate decisions respecting matters such as the substance of contract proposals or the implementation of employee discipline were made in the end by divisional personnel.

The General Counsel and the Charging Parties strongly disputed this evidence and introduced a substantial amount of credible evidence respecting various situations arising in a wide variety of stores and the Denver distribution center in which the Respondent's labor relations attorneys and contract administrators limited contacts and communications by labor organization staff members with store and distribution center management in dealing with grievances beyond very simple matters and repeatedly instructed the union agents to communicate directly and exclusively with the Boise labor relations department staff. Further, substantial evidence was introduced that store directors regularly and repeatedly took the position with union agents, regarding all but the simplest grievance and information matters, that the union official should deal with "Boise" on all questions and not talk to or ask questions of the store manager, creating the impression that the director was bound in all events to take instruction from Boise.

The seeming conflict between the two images created by the evidence—the dominating and controlling central labor relations authority and the decentralized body of strong, independent managers taking counsel, but not instruction, from the advising labor relations department—is not as great as it may appear. Careful consideration of the evidence suggests that two types of labor relations department roles are involved. Much of the independent, dispersed, or operational managerial decision making the Respondent advances concerns economic decision making such as how much to offer in negotiations or what terms to propose in collective bargaining. Even the decision to terminate or discipline an employee has a managerial and economic aspect and, more importantly, is not the primary type of decision that is under scrutiny here.

Much of what the General Counsel argues demonstrates common or centralized control residing with the labor relations department deals with the technical aspects of grievance investigation and handling, information request consideration and provision, and the protocols and procedures of grievance and arbitration processing. In these technical areas the evidence is strong and consistent with the common state of affairs in the commercial world that store managers follow the technical advice of their counsel respecting procedures and policies, even if reserving to themselves the fiscal or economic decisions. Indeed the record is replete with examples of store managers who, while they doubtless would have confident notions of the economics of their stores and may have similar independent views regarding discharge or discipline seemingly gladly de-

ferred entirely to the labor relations department respecting questions of if, when, how, and in what manner or form, information should be given to unions respecting grievances. It is clear and I find that the Boise labor relations department staff were in charge and the operating unit management was not in this narrow area. This is corroborated by the paucity of evidence that such management officials had a decisionmaking role in the large numbers of such matters litigated herein. Thus, there is abundant credible evidence that the store managers frequently told union officials that they had to contact Boise and that the labor relations department staff made the same statements to the Union: talk to Boise.

There was testimony by Respondent's attorney, Yost, that store directors in the Rocky Mountain division decided on their own whether to disclose information, but I find this in reality applied only to low level or routine matters and the labor relations department was in fact the decision maker in the great bulk of the allegations litigated herein. Yost testified also that distribution center management dealt directly with the Teamsters on information requests, often without contacting the labor relations department, and that they were the decision makers respecting what confidential information to give or withhold from the Union. The Union offered substantial credible contradictory testimony. Importantly the correspondence between the labor relations department and the Denver distribution center respecting the information request allegations considered herein as well at the statements of distribution center agents attributed to them by union witnesses is inconsistent with Yost's assertions. Further, in the matters at issue here, virtually without exception, the information involved was released either directly by or upon instruction from the labor relations department staff, or members of that staff informed the Union it could not have the information or, as has been discussed above, the requests to the labor relations department were simply not responded to. I specifically find, discrediting Yost's testimony to the extent necessary, that the Denver distribution center, like the retail stores, were essentially insulated from direct exchanges with the Union on matters of the type at issue herein and that the Boise labor relations department was the controlling gatekeeper and decision maker in the grievance investigation processing and information request area.

Based on this very substantial record as presented in part in the consideration of the complaint allegations discussed above, I find that respecting the issues of union information requests, grievance investigation, information retrieval, and information disclosure, as well as the making of multifacility or multibargaining unit policies and protocols, the Boise labor relations department had practical control of every aspect of decision making as compared and contrasted to decision making at the individual facility level. To the extent the Respondent's witnesses suggested otherwise, they are simply discredited as inconsistent with the overwhelming weight of the credible evidence.

Respecting the degree of independence of the operations of a given labor relations department team assigned to a particular operating division or divisions, I find that there was, as the Respondent argues, an important degree of independence and autonomy of teams—under the direction of their attorneys—

serving various divisions within the western region and, as a result of the instruction of the supervising attorneys, of the contract administrators under their direction. This was clear from the absence of a monolithic approach in labor relations staff training and in the absence of a substantial and detailed controlling set of policies and protocols to be applied by the labor relations department staff uniformly within the various divisional teams.

It is also clear that over time differing labor relations attorneys and their contract administrators have evolved different styles of conduct unique to particular labor relations department teams. Further those individual labor relations team members, in conjunction with the divisional management they regularly deal with have produced somewhat differing standards, protocols, and procedures which manifest in differences between divisions in collective-bargaining agreements and other matters. This independence and autonomy is not based on structural independence but rather the effects of time and was diminished or reduced by the common mission and technical expertise of the department staff as a whole, its common management and direction, and the fact that as a single department in a single location it experienced the harmonizing effects of inter team transfers, the existence of a common purpose and the fact that they were all technical experts confronting common problems on behalf of a common employer. Such a common physical location, expertise, and mission inevitably has a leveling and harmonizing force and effect.

In sum, I find, as alleged by the General Counsel, that with respect to the information cases involved herein as well as the other situations discussed herein in which the labor relations department staff was involved other than tangentially, the labor relations department has been a major decision maker whose approach and attitude as reflected in the findings concerning the violations found herein are relevant to remedial issues herein. While I do not accept the argument of the General Counsel that the Respondent's labor relations department is the unified and sole decision maker respecting the entire course of the Respondent's actions at issue herein, I do find that the important decision makers in the bulk of the allegations involved herein were agents of the Respondent's Boise based department of labor relations.

B. The Issue of the Respondent's Recidivism

The General Counsel and the Charging Parties argue that the Respondent is and has been a persistent violator of the nation's labor laws, an offender against the unions that represent its employees and National Labor Relations Act generally and in particular against the grievance and arbitration process and the unions' legitimate role in it.

The Respondent correctly notes the General Counsel may not rely on earlier unfair labor practices which had been settled as opposed to litigated. Counsel for the Respondent also points out that the considerable size of the Respondent particularly respecting the number of facilities, employees, represented bargaining units, and Unions must be considered when evaluating the number of violations of the Act committed over time. Thus, metaphorically what might be considered an inordinate number of traffic citations for a small trucking company's em-

ployees fades into insignificance for a nationwide company's staff with thousands of employees. Perspective and proportion, the Respondent argues, is all.

The parties also dispute the nature and relationship of the past violations of the Act to the violations found herein. Thus, the General Counsel and the Charging Parties argue that the cases both past and present demonstrate a pattern of violations focusing on information cases of the type at issue herein and on overly broad rules and policies that wrongfully restrict employee union and other protected activity. The Government leans heavily on the Board and court of appeals decisions in *Albertson's, Inc.*, 310 NLRB 1176 (1993), enfd. in an unpublished decision of the United States Court of Appeals for the Tenth Circuit (Case No. 93-9559) (Oct. 3, 1993) (unpublished). The court's decision, the Board's consideration of possible contempt proceedings respecting it, and the parties discussion and agreements thereafter have been discussed tangentially in the resolution of various complaint allegations, supra.

In the 310 Board decision, a Colorado grievance and information request was submitted to the Boise labor relations department by Local 7 in 1990 and no information was forthcoming. Administrative Law Judge Myatt, with Board approval, found Contract Administrator Freckleton's testimony that the union's request had possibly fallen through the cracks, possibly as a result of an illness of the department's office secretary, to be "misleading and designed to obscure the truth." The decision also specifically rejected the respondent's defense that the union's grievance was procedurally defective and therefore the information request based on it was not valid finding that "Respondent cannot avoid its statutory responsibility to furnish the information by claiming procedural defectiveness of the grievance itself." (310 NLRB at 1179.)

That case was but foreshadowing of the instant cases, argue the moving parties herein. The General Counsel and the Charging Parties also urge consideration of the Respondent's conduct of simply not responding to information requests and thereafter claiming illness of staff and procedural defectiveness of the underlying grievances and note that the conduct involved Local 7 and Freckleton, still an active participant within the Boise labor relations department in the instant unfair labor practices, which closely followed in time those found in 310 Board.

The Government and the Unions also discuss a number of prior Board decisions against the Respondent. They point to the "Button Cases" discussed supra in which the Board repeatedly found the Respondent in violation of the Act for overly restrictive companywide rules as well as the decision reported at 307 NLRB 787 (1992), in which the Board found a violation of the Act for enforcing an overly board no solicitation rule and for issuing a warning to an employee containing a threat of termination, if the employee solicited on behalf of the union in the store. They note 323 NLRB 1 (1997), enfd. 161 F.3d 1231 (10th Cir. 1998), for another violation involving disparate enforcement of a no solicitation policy and 332 NLRB 1132 (2000), involving wrongful exclusion of union

⁶⁵ 272 NLRB 865 (1984); 300 NLRB 1013 (1990); 319 NLRB 93 (1995).

representatives from the front of stores and other cases involving the Respondent.

C. The Course of Conduct of the Respondent as a Continuing Pattern and Practice

The General Counsel focuses on the elements described above, the Respondent's Boise-based labor relations department's centralized control over labor relations, the type of and identity of the Respondent's agents involved in the violations of the Act found in previous Board adjudications, and the course of conduct of the Respondent through the instant matter. The General Counsel's contention, joined in by the Charging Parties, and vigorously opposed by the Respondent, is that the whole constitutes more than the sum of the parts.

The General Counsel argues that the Respondent's labor relations department has historically, and through the instant allegations, maintained and acted in accordance with a hidden agenda which is to weaken the labor organizations that represent the Respondent's employees by making the unions task of representing unit employees in the grievance and arbitration process harder, more expensive, slower, and less effective. The Government and the Unions argue that the Respondent has attempted to achieve this result by repeatedly and systematically delaying, denying, and otherwise subverting the labor organizations' ability to obtain timely and accurate information respecting grievances. They argue further that the Respondent also acts to improperly limit employee Section 7 rights to engage in protected activity by enacting, maintaining, and enforcing overbroad rules restricting employee conduct in their stores and union representatives' conduct in California in the public areas around its stores and by the other acts and conduct found violative of the Act herein.6

The Charging Party Teamsters and Charging Party Local 7 in the Rocky Mountain division served by the Rocky Mountain team in the Boise labor relations department emphasize the particularly significant history of the Respondent's misconduct in that area concerning grievance and arbitration procedures including information cases. And they note the high concentration of violations found in that division herein.

The Respondent will have none of it. Counsel for the Respondent argue that the unfair labor practices both historic and in the instant case are simply small in proportion to the size and complexity of the commercial enterprise involved, concentrated in a few geographical areas involving only a few local unions and a few of the Respondent's hundreds of locations.⁶⁷ Thus, for example, argues the Respondent, only a single distribution

center is involved out of the many operated by the Respondent at relevant times. What pattern or practice respecting distributions centers can such a narrow base support? The bulk of allegations in the instant case are concentrated in the Rocky Mountain division of the Respondent—and indeed only a relatively small number of facilities within the division—and heavily focus on Local 7 and Teamsters Local 537. What possible pattern of conduct respecting the Respondent's entire western division may be drawn from that distribution of charges?

The Respondent also argues that significant changes in the Respondent's department of labor relations have occurred that in its view eliminates any possible propriety of the remedies sought. Thus, it notes the change in the geographical location of elements of the Respondent's department from a single Boise location to a developing on site or dispersed administration. It further notes the substantial personnel turnover in the labor relations department as well as the fact that few of the agents centrally involved in the events in controversy remain at the former positions.

Renewing in their discussed arguments, the Respondent strenuously denies the various links in the Government's logical chain. Thus, it argues that the labor relation's department is of counsel to the operational units and it was the dispersed operational units who were the decisionmaking agents of the Respondent herein. It argues that much of the difficulty and delay in the processing of information requests was in fact a direct result of the campaign of the Unions to overload or swamp the Respondent as well as the result of personnel shortages caused by illness and other circumstances within the labor relations department. The Respondent relies on the testimony of its attorneys and contract administrators that the actions under challenge herein were taken in good faith and that no cabal or agenda existed either in the abstract or in implementation to do other than act in good faith to meet the obligations of the law in dealing with the unions that represent the Respondents employees. Counsel for the Respondent therefore opposes the remedies requested by the Government and, with clenched jaw, for no counsel willingly admits to any violation of law by his or her client, counsel for the Respondent seeks only the normal, restricted, traditional remedies for any violations found.

III. ANALYSIS AND CONCLUSIONS RESPECTING REMEDY

A. Relevant Authority

Section 10(c) of the Act provides in part that the Board upon finding unfair labor practices shall issue an,

[O]rder requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act. . . .

The Supreme Court has held that the Board's remedial power is a broad discretionary one. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964). It has further held in *May Department Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945):

[T]he test of the proper scope of a cease and desist order is whether the Board might reasonably have concluded from the evidence that such an order was necessary to prevent the em-

⁶⁶ The Charging Party International argues that the violations found herein span eight States (Colorado, Idaho, South Dakota, Montana, Washington, Oregon, California, and Arizona) and employees represented by 26 different local unions. The information cases cover at least 48 allegations involving nine locals in six States.

⁶⁷ The Respondent argues that at relevant times the western division had approximately 487 organized stores and 6 distribution centers. During 1994 to 1998 the Respondent asserts there were at least 2000 unique information requests. Further, the Respondent argues that the great bulk of the allegations of the complaint respecting information cases came from 34 retail stores and a single distribution center, with the very great number arising in the Rocky Mountain division.

ployer before it "from engaging in any unfair labor practice affecting commerce."

The Court holds that the Board may issue "an order restraining other violations" of the Act where "[the] danger of their commission in the future is to be anticipated from the course of [the employer's] conduct in the past." Id. at 392 (quoting *NLRB v. Express Publishing Co.*, 312 U.S. 426, 437 (1941).

From its earliest days, the Board has consistently required the posting of remedial notices in conjunction with cease-and-desist orders. Posting normally occurs at the locations necessary to advise employees affected by the unfair labor practices of the cease-and-desist order and any other relief directed. Thus, an information request violation might require notice posting at only the facility involved, but a violation respecting a rule or policy of wider application might require posting at each location at which the rule or policy was in force. *Postal Service*, 303 NLRB 463, 463 fn. 5 (1991).

The Board and the courts have recently dealt with the issue in the *Beverly* cases. The Court of Appeals for the Seventh Circuit noted in *Beverly California Corp.*, 227 F.3d 817 (2000), enfg. in part, vacating in part and remanding 326 NLRB 232 (1998):

When an employer has many different facilities, all of which are affected by the same general policies, the Board is not required to proceed facility-by-facility, waiting for the next shoe, and the next shoe, to drop. It can instead eliminate the policies that lead to the commission of unfair labor practices by managers lower down on the corporate ladder. [227 F.3d at 828.]

Broader posting requirements, employerwide or—as the General Counsel seeks in part herein—divisionwide notice posting beyond the facilities directly involved in the unfair labor practices, have been directed by the Board in several situations. The Board in *J. P. Stevens & Co.*, 245 NLRB 198 (1979), enfd. in relevant part 638 F.2d 676 (4th Cir. 1980), premised its corporate wide relief on the "clear and longstanding proclivity of Respondent to commit similar violations at its other facilities." (Id. at 198.)

The court of appeals noted one such situation in *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994), denying enforcement in part to *Beverly California Corp.*, 310 NLRB 222 (1993):

A corporate-wide order is properly remedial where . . . the evidence supports an inference that the employer will commit further unlawful acts at a substantial number of other sites.

Such an inference may be drawn in appropriate situations where there has been a history of past violations and a link, organizational or by individual agents, between the agents or organization who committed the past violations and the substantial number of other sites where future violations may be likely to occur. Thus, the Board has relied on the participation of divisional or corporate personnel in unfair labor practices at multiple sites in the *Beverly Trilogy: Beverly California Corp.* (Beverly II), 310 NLRB 222 (1993); Beverly California Corp. (Beverly III), 326 NLRB 153 (1998); and Beverly California Corp. (Beverly III), 326 NLRB 232 (1998). Judge Wood, in a

decision of the Seventh Circuit enforcing in part, denying enforcement in part and remanding *Beverly II* and *III*, 227 F.3d 817 (2000), held at 846:

Factors that are helpful in deciding whether an order is too broad include (1) the number of violations as compared to the number of unaffected parties and facilities, (2) the types of violations, (3) the corporate control over, or causation of, the unfair labor practices, and (4) the publicity of the unfair labor practices among employees.

B. The Breadth of the Remedy

The General Counsel's proposed remedy includes all the facilities served by the Respondent's Boise based labor relations department during the years 1996 though 1998 (The General Counsel's posthearing brief at 418-419 fn. 331.) Organizationally, the Respondent at relevant times had a southern and a western division. Only the western division was served from Boise and is the target of the Government's proposed remedy. Thus the remedy sought is not a nationwide or corporatewide remedy, but rather one that is "Boise Labor Relation's Department" wide. 68 Further, given the addition of new facilities and organizational changes that have and continue to occur within the Respondent's administrative structure, doubtless some facilities would be covered that are no longer served from Boise and is also possible that some facilities now served from Boise were not during the relevant period and would therefore not be included in the proposed order.

Utilizing Judge Wood's criteria quoted above to crystallize the issue respecting the remedy's breadth, it is appropriate to initially consider the number of violations as compared to the number of unaffected parties and facilities. In the instant case, a threshold issue is the definition of what constitutes an unfair labor practice so that those found herein may be in a relevant way quantified and that quantification considered in context. The problem is definitional: how are the unfair labor practices in the instant case to be measured. Thus for example respecting the large number of information request allegations, was it an unfair labor practice for the respondent to refuse to provide or to untimely supply information respecting each item sought, each request made, each item untimely or inaccurately provided? When a Boise labor relations professional wrongfully denies a union agent information respecting a grievance involving out-of-an-event at a single store, but under contract covering many stores, is that unfair labor practice truly limited to the facility? How are the unfair labor practices committed by the Respondent in maintaining an improper companywide or Californiawide rule covering hundreds of facilities to be measured?

And having established the necessary definitions and reduced the process to arithmetic quantification and geographic distribution, results may still vary widely. The Respondent and the Charging Parties adduced expert testimony concerning

⁶⁸ The General Counsel argues:

In sum at least 14 highly trained Boise corporate labor relations officials overseeing labor relations in all of the divisions in Respondent's "Western Region," committed numerous serious violations of the Act affecting multiple facilities. (The General Counsel's posthearing brief p. 420.)

these matters which were at great variance. Under any numeric approach, some distortion is possible. As Judge Woods noted in dealing with this issue: "But, as is often the case, there are quite a few ways to crunch those numbers, which leaves us with the feeling that they are not ultimately too helpful." (Beverly California Corp., 227 F.3d 817, 847 (7th Cir. 2000).) In my view it is necessary to constantly keep in mind, to the extent possible, the specific nature of the individual violations found and their context in the larger picture. Numeric and arithmetic recitations of the parties must be viewed with care and some skepticism. The record and the violations found must be considered in a qualitative as well as a quantitative manner, apart from the separate consideration to be given to the nature and type of violations in the sense of hallmark or serious violations of the Act.

I accept the proposition that both the distribution arguments of the Respondent and the Charging party have arguable merit. I decline to parse and factor the numbers further to obtain purportedly a more accurate type of guiding multiples and proportions. The violations found are recited above and may be numbered and compared against the numbers of the Respondent's facilities and the business of the labor relations department. It is not disdain that dissuades me from undertaking an econometric or quantitative analysis. The numbers are clearly important. Rather it is the awareness of the issue of significant digits over precise arithmetic calculation conceal the fact that the numbers may rest on a weak foundation of definitional assumptions. The extent and distribution of the unfair labor practices found herein need in my view to be judged in their total qualitative sense and tallying them by any particular definition puts too fine a point on the analysis. Judge Woods concluded in Beverly that: "perhaps the best numbers take a more global view." (Beverly California Corp., 227 F.3d at 847.) I find the global view clearly produces the better analysis herein.

Applying that approach in the instant case, the global view support the Respondent's argument that the bulk of the unfair labor practices found herein are violations which occurred in the Respondent's Rocky Mountain division. The remaining unfair labor practices are far fewer in number and are more broadly dispersed by type, by division and by facility.

The remainder of the elements on Judge Wood's quoted list of factors to determine if a remedy is overboard are easily summarized in this case. It is clear that with the exception of the statements of store agents found to be in violation of Section 8(a)(1) of the Act, the entirety of the unfair labor practices committed herein were committed by or on the authoritative instruction of the Respondent's labor relations department staff assigned to assist the divisions where the unfair labor practices took place. The bulk of the violations found herein are information violations with the remaining violations not sharply focused on any particular type of violation. Publicity respecting the violations among the Respondent's employees was not a factor in the instant litigation.

Turning to questions of recidivism and the likelihood of the occurrence of repeat violations of the type involved herein, the earlier Board and court cases advanced by the General Counsel and the Charging Parties do show a propensity to violate the Act by the Respondent, or more particularly the Respondent's

Boise department of labor relations, but the Respondents arguments respecting the proportion of cases given the size of the Respondent's operations and the number of its facilities relevant here. The divisions of the western region other than the Rocky Mountain division are not heavily involved in the reported cases any more than they are respecting the allegations of the instant cases. I find much more significant the history of information case violations and their focus in the team handling the Rocky Mountain division. Respecting that division there is a significant and repeated pattern of violations that transcended the replacement of the labor attorney in charge of the team.

Considering all the above, the cited cases, the skilled arguments of the parties and the very substantial record on this issue, I find and conclude that the General Counsel's proposed unitary, western divisionwide remedy is overbroad and the unfair labor practices found herein do not support or justify such a remedy. Grossly simplifying a complex issue, I am persuaded by the Respondent's argument that when one looks to the pattern or distribution of the number and type of violations found and the earlier cases in which violations were found, in the larger context of the Respondent entire operation, there is insufficient proportion or coherence to the violations to support the extraordinary remedy sought. Implicit in this finding is the additional finding which I explicitly make here: I do not find that the Respondent's Boise based labor relations department was acting with a common malign purpose respecting the violations found herein or even in the information cases within that case population.

While rejecting the broad remedy proposed by the Government for the Respondent's western division, I do find such a remedy appropriate on a smaller scale. Thus, I shall direct such a remedy for the Respondent's Rocky Mountain division. The arguments the General Counsel and the Charging Parties made in support of their proposed remedy as it was to apply to the western division apply with far greater force to the Rocky Mountain division. Indeed the more effective defenses of the Respondent regarding the remedy issue supported the proposition that no broad remedy should lie against the western division because there is no fair distribution or proportion of cases within it: all because the great bulk of the cases involved herein occurred within the Rocky Mountain division.

Respecting that division the violations found are much more significant in number and involve a higher or more proportionate part of the facilities and grievances. The control of the division's labor relations is very highly focused in a controlling labor attorney managing the Boise labor relations team assigned to the division who on this record regularly gave instruction to or consulted with the other labor department professionals serving the division. The arguments regarding recidivism, as noted, apply with greater force to the division than to the western region.

Respecting the Rocky Mountain division, I do not find the Respondent's arguments that turnover, restructuring, and the simple passage of time have make a broad divisionwide remedy inappropriate. There is no question that the difficulties in the

division had been longstanding,⁶⁹ and proceeded the hiring of Labor Relations Attorney Yost, as discussed supra. Thus, the replacement of the lead attorney in the labor relations department's Rocky Mountain division team did not change the pattern of conduct found violative herein. And, as found in the individual allegations discussions supra, the actions of the Rocky Mountain division labor relations department team staff in a variety of situations revealed an essential disdain for the obligations of the statute in the information area. Were it necessary to sustain the remedy directed, I would find, based on the record as a whole, that the Boise labor relations department team serving the Rocky Mountain division did in fact act in a deliberate way to frustrate union information gathering.

There is no question that the violation of an employer's duty to supply information to the labor organizations that represent employees, a violation of Section 8(a)(5) and (1) of the Act, is not a hallmark or serious violation of the type often discussed in this context or in considering the appropriateness of a bargaining order. However, in agreement with the General Counsel and the Charging Parties, I find that this type of violation, especially when the violations are not simply occasional delays, but are systematic, widespread refusals to provide any information whatsoever and which regularly increased the significant burden on the labor organizations involved to complete their grievance investigations and/or present their case to the arbitrator, can have a very significant and adverse effect on the representing Unions both by unnecessarily expending their resources which could be better allocated elsewhere and by undermining support for the Unions among employees by hindering the effectiveness of the contractual grievance and arbitration systems. Further, and of significance, there is also the constant risk that wrongful interference with the information process will result in unjust results respecting the grievances filed and the employees who potentially have wrongs that need righting. I find therefore that even though the information cases are not by definition serious or hallmark violations of the Act, the total course of conduct involved herein is of significance and consequence and merits special relief as to the Rocky Mountain division.

Having found that it is appropriate to direct a broad remedy to the Rocky Mountain division, the remedial provisions applicable to the remaining areas outside that division will be discussed below, the question remains just what provisions will be required as part of the divisionwide remedy. A divisionwide posting among all facilities employing represented employees is appropriate and will be directed keeping in mind the teachings of Beverly California Corp., 227 F.3d 817 (7th Cir. 2000). that a multifacility notice should not be a laundry list of violations found at every facility but rather should include divisionwide relief supplemented with relief directed to individual facilities. Further the notices will conform to the Board's recent decision in Ishikawa Gasket America, Inc., 337 NLRB 175 (2001), that notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations found. In view of the density, repetitive nature and severity of the information case violations in the Rocky Mountain region, and given the broad and longstanding pattern of misconduct in the division, I further find that the conduct is likely to continue. For these reasons I shall also direct as part of the Rocky Mountain division remedy that the Respondent cease and desist from violating the Act in any other manner.

As part of the General Counsel's proposed extraordinary remedy, beyond the traditional elements applicable to information cases and the posting of notices, the General Counsel seeks an order requiring the Respondent's labor relations professional staff and those who hold the positions for a period of 5 years, be provided with a copy of the Order and to:

[R]equire each such individual to certify in writing that they have read and are familiar with the terms of the Board's Order and Notice (and any Court judgment that may subsequently issue). Respondent shall maintain, and provide upon request, copies of said certificates to agents of the Board for a period of five (5) years from the date of the Board's Order.

The Respondent complains that this element of the requested remedy is Draconian, disproportionate and inappropriate.

The Board has used this type of remedy only in extraordinary situations and it is viewed as an unusual and onerous—although not Draconian—remedy. The record is clear, however, that the Respondent as a matter of personnel policy both historically and currently regularly distributes various personnel rules and other memoranda to its employees and requires that that certify in writing that they have received and read the policy. This is done by having staff sign printed copies of the rules. The Respondent thereafter maintains such writings as part of the individual employees' personnel records. This fact makes the General Counsel's proposed remedy—for this particular respondent—seem not an unusual or severe remedy but rather simply a requirement that the Respondent utilize its traditional methods for making its labor relations employees aware of important personnel matters.

Despite the fact that the proposed requirement is in essence an almost typical or insignificant addition given the Respondent's virtually identical practices, I would not include it in the Order simply for that reason. Nor do I find General Counsel's argument that it is justified regionwide because of the extent of the violations found and the history of recidivism that has been established. This is but a reprise of the western regionwide remedy issue. I shall therefore not require this element of the

⁶⁹ The Respondent's counsel in a November 1996 lengthy letter to the Board sought to distinguish the Rocky Mountain division even then:

The situation involving Region 25 [Colorado] clearly presents a very different picture than the other regions discussed above. . . . It is acknowledged that problems have existed in the past in Colorado, but significant steps have been taken to rectify the problems. . . .

The difficulty in Colorado was primarily due to an overwhelming number of grievances and the lack of responsiveness in certain situations by the Albertson's attorney who was responsible for labor relations in that area. This combination of factors has not been repeated elsewhere. . . .

[[]T]o the extent problems are found to exist in Colorado, they should be addressed in cases arising in Colorado as has been done and not elsewhere, such as the instant case.

request order in any aspect of the remedy directed herein with the exception noted below.

I shall include the General Counsel's proposed requirement respecting the Order in so far as it applies to the Rocky Mountain division information cases and the labor relations staff assigned to that division. I do so to that extent because I was unusually impressed with extent of the violations found involving those individuals both in the instant case and in the earlier Board and court cases. Further and importantly, I also found that these was substantial resistance on the part of labor relations staff assigned the Rocky Mountain division, as is demonstrated in my view in the discussion of the individual complaint allegations above, to honoring the obligations of the Act insofar as they require employers to be reasonable in responding to information requests. I think it is appropriate to take reasonable steps in the remedy to diminish the danger that the obligations of the Act will not be fully considered by these staff members. There was also an element of defiance on the part of some of the staff again noted in the complaint allegation discussions, which is paralleled in the reported Board cases. Given all the above, and on the record as a whole, I shall therefore require the requested acknowledgement of labor relations staff serving the Rocky Mountain division and no others.

Turning to the additional requested remedy of the Charging Party Teamsters Local 537, quoted above, the request raises the issue of the propriety of providing specific objective performance instructions and requirements to the Respondent to be followed in the consideration of information requests. The more traditional remedy is simply to require a respondent-employer to bargain in good faith by responding timely and reasonably to information requests. The Charging Party Teamsters Local 537 seeks an order requiring the Respondent to meet certain specific time targets, to respond to information requests with timely acknowledgment of the request, and to elect from various courses to fully communicate with the Union that has submitted an information request its intentions respecting the request.

While I would not normally find such specification appropriate, the conduct of the Respondent's agents respecting Teamsters' information requests was particularly egregious and showed a complete lack of understanding of the Respondent's obligations under the Act respecting information requests. Indeed this same out-of-sympathy conduct was demonstrated in a significant way in the information cases in the Rocky Mountain division cases. In this setting, in agreement with the Teamsters, I find it appropriate to include a series of specific conduct requirements in the remedy directed respecting the Rocky Mountain division information cases. This being the case I shall modify and augment the specific provisions sought by the Teamsters to apply to the entire division.

Respecting the appropriate remedy for remainder of the cases, I shall direct traditional separate remedies for the other violations found. If violations occurred at individual locations, notice posting will be required at those individual locations. I shall provide the normal recission remedy respecting the rules found to violate the Act and provide the traditional posting at each location where such rules were in place. Rather than detail specific stores by location, a matter beyond the instant re-

cord, more general posting formulas for determining posting locations shall be utilized. I have considered the fact that in some facilities multiple notice postings will occur. I do not find this improper nor punitive inasmuch as all notice postings are appropriate at the sites directed and a larger or consolidated notice in such settings would become complex and cumbersome and would not assist in communicating to employees the resolution of the matters involved. These additional remedies will conform to the Board's *Ishikawa Gasket*, supra, instructions, but will not require labor relations staff certification nor include a broad cease-and-desist order.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and on the entire record, I make the following conclusions of law.

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The United Food and Commercial Workers International Union and its Affiliated Locals 4, 7, 8, 44, 81, 135, 324, 367, 368A, 373, 381, 394, 428, 555, 588, 770, 839, 870, 1036, 1105, 1167, 1179, 1288, 1428, 1439, and 1442 are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act.
- (a) The International Brotherhood of Teamsters Local 537 has been and is now a labor organization within the meaning of Section 2(5) of the Act.
- (b) The Bakery Confectionery, Tobacco Workers and Grain Millers, Local 119, AFL–CIO has been and is now a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent's employees in the following appropriate bargaining units have been represented by the noted labor organizations for the periods set forth.
- (a)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees actively engaged in the handling and selling of merchandise, including part-time workers who work regularly one (1) day or more a week, employed by the Respondent in the grocery stores owned or operated by the Respondent covered by a Clerks agreement with the Union on May 1, 1982, and located in the metropolitan area of Denver, Colorado, but excluding all store directors, assistant store directors (in stores with average sales volume in excess of \$100,000 per week), general merchandise directors (in stores with average volume sales in access of \$150,000 per week), office clerical employees, scanning coordinator, janitors, meat department employees, bakery production employees, demonstrators, watchmen, guards, and professional employees and supervisors as defined in the National Labor Relations Act as amended.

(a)(2) Since about 1964, and at all material times, UFCW 7 has been the designated exclusive collective-bargaining representative of the above unit and since that date UFCW 7 has been recognized as such representative by the Respondent. At all times since April 8, 1964, UFCW 7, based on Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the Denver grocery unit.

(b)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All meat cutters, apprentices, wrappers, butcher block sales persons, and delicatessen employees, clean-up personnel, including part-time workers who work regularly one (1) day or more a week, employed by the Respondent in the meat market or markets owned or operated by the Respondent in the metropolitan area of Denver, Boulder, Longmont, Colorado Springs & Security, Colorado, but excluding all store managers, courtesy clerks, office and clerical employees, janitors, parking lot attendants, food clerks, warehouse employees, watchmen, guards and professional employees and supervisors as defined in the National Labor Relations Act, as amended, and all other employees.

(b)(2) Since about 1994, and at all material times, UFCW 7 has been the exclusive collective-bargaining representative of the Front Range meat unit, and since that date, UFCW 7 has been recognized as such representative by the Respondent. At all times since 1994 based on Section 9(a) of the Act UFCW 7 has been the exclusive collective-bargaining representative of the Front Range meat unit.

(c)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All grocery and produce department employees and bakery department sales employees employed by the Respondent in its Max Food stores presently located at 7170 N. Federal Blvd., Westminster, Colorado, 1339 S. Federal Blvd., Denver Colorado, 15380 E. Hampden Ave., Aurora, Colorado, 4262 Wadsworth, Wheat Ridge, Colorado, and 7667 West Jewell, Lakewood, Colorado; but excluding all Store Directors, Assistant Store Directors, General Merchandise Managers (in stores with average sales volume in excess of \$150,000 per week) Office and Clerical Employees, Scanning Coordinators, Janitors, Meat Department Employees, Bakery Department Production Employees, Demonstrators, Watch-men, Guards and Professional Employees and Supervisors as defined in the National Labor Relations Act as amended.

(c)(2) Since 1994, and at all material times, UFCW 7 has been the designated exclusive collective-bargaining representative of the UFCW 7 Max Foods clerks unit and since that date, UFCW 7 has been recognized as such representative by the Respondent. At all times since about 1994, based on Section 9(a) of the Act, UFCW 7 has been the exclusive collective-bargaining representative of the UFCW 7 Max Foods clerks unit.

(d)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All meatcutters, apprentices, wrappers, clean up personnel, including part-time workers who work regularly one (1) day or more a week, employed by the Respondent in the Grocery Warehouse (Max Foods) meat market or markets owned or operated by the Respondent located at 7170 North Federal Boulevard in Westminster, Colorado, 1339 South Federal

Boulevard in Denver, Colorado, 15380 East Hampden Avenue in Aurora, Colorado, 4262 Wadsworth in Wheat Ridge, Colorado, and 7667 West Jewell, Lakewood, Colorado, but excluding all store directors, assistant store directors, courtesy clerks, office and clerical employees, janitors, parking lot attendants, food clerks, warehouse employees, watchmen, guards and professional employees and supervisors as defined in the National Labor Relations Act, as amended, and all other employees.

(d)(2) Since 1994 and at all material times, UFCW 7 has been the designated exclusive collective- bargaining representative of the UFCW 7 Max Foods meat unit and since that date, UFCW 7 has been recognized as such representative by the Respondent. At all times since 1994, based on Section 9(a) of the Act, UFCW 7 has been the exclusive collective-bargaining representative of the UFCW 7 Max Foods meat unit.

(e)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All grocery and produce department employees and the bakery department sales clerks including part-time employees regularly working one (1) day per week or more, employed by the Respondent in its retail food store located at 1830 North 12th Grand Junction, Colorado; but excluding the Store Director, Grocery Manager, Front End Manager, Produce Manager, General Merchandise Manager, office clerical employees, janitors, parking lot attendants, meat department employees, bakery department production employees, professional employees, watchmen, guards, scan coordinator, and supervisors as defined in the Act.

(e)(2) Since 1994 and at all material times, UFCW 7 has been the designated exclusive collective-bargaining representative of the Grand Junction clerks unit and since that date, UFCW 7 has been recognized as such representative by the Respondent. At all times since 1994 based on Section 9(a) of the Act, UFCW 7 has been the exclusive collective-bargaining representative of the Grand Junction clerks unit.

(f)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All meatcutters, meatcutter apprentices, butcher block and service deli employees, and wrappers employed by the Respondent at its store located at 1830 North 12th Grand Junction, Colorado; excluding the Meat Department Manager, Deli Department Manager, grocery and bakery employees, office clerical employees, guards, professional employees, Butcher Block supervisor, and supervisors as defined in the National Labor Relations Act, as amended and all other employees.

(f)(2) Since 1994 and at all material times, UFCW 7 has been the designated exclusive collective-bargaining representative of the Grand Junction meat unit and since that date UFCW 7 has been recognized as such representative by the Respondent. At all times since 1994, based on Section 9(a) of the Act, UFCW 7 has been the exclusive collective-bargaining representative of the Grand Junction meat unit.

(g)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent at its Max Foods Warehouse store located at 3229 I-70 Business Loop, Clifton, Colorado; but excluding all meat department employees, the Store Director, the Assistant Store Director, Third, Fourth and Fifth Persons, the Front End Manager, the Produce Manager, the General Merchandise Manager, the Deli and Bakery Managers, office and clerical employees, guards and supervisors as defined in the Act and all other employees.

(g)(2) Since 1994 and at all material times, UFCW 7 has been the designated exclusive collective-bargaining representative of the Grand Junction Max Foods clerks unit and since that date, UFCW 7 has been recognized as such representative by the Respondent. At all times since 1994, based on Section 9(a) of the Act, UFCW 7 has been the exclusive collective-bargaining representative of the Grand Junction Max Foods clerks unit.

(h)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees actively engaged in the handling and selling of merchandise including Head Produce Manager, Salad Bar Clerks, Courtesy Clerks and part-time employees who work regularly eight (8) hours or more per week, employed by the Respondent in the grocery store and stores owned and operated by the Respondent in the City of Casper, Wyoming and vicinity; excluding Store Managers, one Assistant Manager per store, one General Merchandise Manager per store (hired, promoted or transferred into the position after August 18, 1995), Scan Coordinator, Meat Department Employees, Janitors, Parking Lot Attendants, Demonstrators, Watchmen, Guards, Office Clerical Workers, Professional Employees and Supervisors, as defined in the National Labor Relations Act, as amended.

(h)(2) Since 1994, and at all material times, UFCW 7 has been the designated exclusive collective-bargaining representative of the Casper clerks unit and since that date UFCW 7 has been recognized as such representative by the Respondent. At all times since 1994, based on Section 9(a) of the Act, UFCW 7 has been the exclusive collective-bargaining representative of the Casper clerks unit.

(i)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All drivers, warehousemen, mechanics, sanitation, salvage, janitorial, and building and equipment maintenance employees employed by the Respondent at its Distribution Center located at 2780 North Tower Road, Aurora, CO, excluding clerical employees, professional employees, guards, watchmen, foremen, and supervisors as defined in the Act, and all other employees.

(i)(2) Since about November 1, 1994, and at all material times, Teamsters 537 has been the designated exclusive collec-

tive-bargaining representative of the Teamsters 537 unit, and since that date Teamsters 537 has been recognized as such representative by the Respondent. At all times since 1993, Teamsters 537 based on Section 9(a) of the Act, has been, the exclusive collective-bargaining representative of the Teamsters 537 unit.

(j)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Employees working in the job classifications covered by this agreement at 855 Omaha Street, Rapid City SD 57701, excluding the Store Director, Grocery Manager, Drug/General Merchandise Manager, Third Person, Third Person Drug, Produce Manager, Meat Manager, Service Deli Manager, Customer Service Supervisor, Liquor Manager, Scan Coordinator, Bakery Manager, Demonstrators, Office Clerical Employees, Pharmacists and Pharmacy Employees, Bookkeepers, Confidential Employees, Guards and Supervisors as defined in the National Labor Relations Act.

(j)(2) Since about July 1996 and at all material times herein, UFCW 394 has been the designated exclusive collective-bargaining representative of the Rapid City grocery unit and since that date UFCW 394 has been recognized as such representative by the Respondent. At all times since 1994, UFCW 394 based on Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the Rapid City grocery unit.

(k)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Clerks and part-time employees employed by the Respondent (at its store presently located at 1210 Tenth Avenue South and all other units which may be opened in Cascade County) to receive, ship, box, sack, wrap, mark, stock, check, sell or deliver retail grocery and produce commodities except the store manager, assistant store manager, produce manager, scanning coordinator or point of sale coordinator, and in stores of 20,000 square feet or more, a third person or second assistant and supervisors as defined in the labor management act, personnel engaged in the production, marketing or sale of bakery goods in establishments maintaining "in-store bakeries" and all personnel employed in or in connection with the meat departments.

(k)(2) Since about October 1994 and at all material times, UFCW 8 has been the designated exclusive collective-bargaining representative of the Great Falls clerks unit and since that date UFCW 8 has been recognized as such representative by the Respondent. At all times since 1994, UFCW 8 based on Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the Great Falls clerks unit.

(l)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf including the Respondent in their present and future grocery stores, in the grocery, non-foods, snack bar, take-out food, service delicatessen, meat and bakery sales departments, including concessions under the direct control of the employer, the Meat Market Manager, Journeyman and Apprentice Meatcutters, Wrappers, and Service Counter Employees located in Skagit County, Washington, but excluding the Snack Bar, Deli, Non-Foods and Bake-Off Deli Managers, and three exempt employees per store selected at the sole discretion of the Respondent, in addition to supervisory employees within the meaning of the Act.

(1)(2) Since about March 31, 1996, and at all material times, UFCW 44 has been the designated exclusive collective-bargaining representative of the Skagit grocery/meat unit and since that date UFCW 44 has been recognized as such representative by the Respondent. At all times since March 31, 1996, based on Section 9(a) of the Act, UFCW 44 has been the exclusive collective-bargaining representative of the Skagit grocery/meat unit.

(m)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Market Managers, Journeyperson and Apprentice Meat Cutters, Journeyperson and Apprentice Meat Wrappers, and Lead and Journeyperson Service Counter Employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, at their retail stores in Snohomish County, Washington but excluding all other employees and supervisors within the meaning of the Act

(m)(2) Since about April 30, 1995, and at all material times, UFCW 44 has been the designated exclusive collective-bargaining representative of the Snohomish meat unit and since that date, UFCW 44 has been recognized as such representative by the Respondent. At all times since April 30, 1995, based on Section 9(a) of the Act, UFCW 44 has been the exclusive collective-bargaining representative of the Snohomish meat unit.

(n)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent in Whatcom County, Washington in the grocery, meat, bakery, and deli departments, but excluding the Snack Bar, Deli, Non-Foods or Bake-Off Deli Managers and three other exempt employees selected at the sole discretion of the Employer, managerial employees, office employees, and supervisory employees within the meaning of the Act.

(n)(2) Since at least March 31, 1996, and at all material times, UFCW 44 has been the designated exclusive collective-bargaining representative of the Whatcom meat/grocery unit and since that date, UFCW 44 has been recognized as such representative by the Respondent. At all time since March 31, 1996, based on Section 9(a) of the Act, UFCW 44 has been the

exclusive collective-bargaining representative of the Whatcom meat/grocery unit.

(o)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Market Managers, Journeyperson and Apprentice Meat Cutters, Journeyperson and Apprentice Wrappers, and Service Counter Employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, at their retail meat markets in Jefferson and Clallam Counties, Washington but excluding all other employees and supervisors within the meaning of the Act.

(o)(2) Since June 2, 1996, and at all material times, UFCW 44 has been the designated exclusive collective-bargaining representative of the Jefferson meat unit and since that date, UFCW 44 has been recognized as such representative by the Respondent. At all times since June 2, 1996, based on Section 9(a) of the Act, UFCW 44 has been the exclusive collective-bargaining representative of the Jefferson meat unit.

(p)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Meat Market Managers, Journeyperson and Apprentice Meat Cutters, Journeyperson and Apprentice Wrappers, and Service Counter Employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in their retail meat markets in King County, Washington, but excluding all other employees and supervisors within the meaning of the Act.

(p)(2) Since April 14, 1995, and at all material times, UFCW 81 has been the designated exclusive collective-bargaining representative of the King meat unit and since that time UFCW 81 has been recognized as such representative by the Respondent. At all times since April 14, 1995, based on Section 9(a) of the Act, UFCW 81 has been the exclusive collective-bargaining representative of the King meat unit.

(q)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Market Managers, Journeyperson and Apprentice Meat Cutters, Journeyperson and Apprentice Wrappers, and Service Counter Employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, at their retail meat markets in Mason/Thurston Counties, Washington, but excluding all other employees, and supervisors within the meaning of the Act.

(q)(2) Since April 17, 1995, and at all material times, UFCW 81 has been the designated exclusive collective-bargaining representative of the Mason meat unit and since that date, UFCW 81 has been recognized as such representative by the Respondent. At all times since April 30, 1995, based on Section

9(a) of the Act, UFCW 81 has been the exclusive collectivebargaining representative of the Mason meat unit.

(r)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Market Managers, Journeyperson and Apprentice Meat Cutters, Wrappers and Apprentice Wrappers, and Service Counter Employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, at their retail meat markets in Pierce County, Washington, but excluding all other employees, and supervisors within the meaning of the Act.

(r)(2) Since at least April 30, 1995, and at all material times, UFCW 367 has been the designated exclusive collective-bargaining representative of the Pierce meat unit, and since at least that time UFCW 367 as been recognized as such representative by the Respondent. At all times since at least April 30, 1995, based on Section 9(a) of the Act, UFCW 367 has been the exclusive collective-bargaining representative of the Pierce meat unit.

(s)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in present and future grocery stores, including concessions under the direct control of the Respondent, located in Pierce County, State of Washington, but excluding employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, and supervisory employees within the meaning of the Act.

(s)(2) Since at least April 30, 1995, and at all material times, UFCW 367 has been the designated exclusive collective-bargaining representative of the Pierce grocery unit, and since that date UFCW 367 as been recognized as such representative by the Respondent. At all times since at least April 30, 1995, based on Section 9(a) of the Act, UFCW 367 has been the exclusive collective-bargaining representative of the Pierce grocery unit

(t)(1) The following employees of the Respondent, herein called the Mason grocery unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in the grocery, bakery, snack bar, take-out food, deli and non-food departments in their present and future grocery stores located in Mason/Thurston Counties, Washington, including concessions under the direct control of the Employer party to this agreement, but excluding employees whose work is performed within a meat, culinary, prescription or bakery

production department location of the retail establishment, and supervisors within the meaning of the Act.

(t)(2) Since September 24, 1995, and at all material times, UFCW 367 has been the designated exclusive collective-bargaining representative of the Mason grocery unit and since that time UFCW 367 has been recognized as such representative by the Respondent. At all times since September 24, 1995, based on Section 9(a) of the Act, UFCW 367 has been the exclusive collective-bargaining representative of the Mason grocery unit.

(u)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in its retail food stores within Solano and Napa Counties, California, but excluding meat department employees and supervisors within the meaning of the Act.

(u)(2) Since March 1, 1992, and at all material times, UFCW 373 has been the designated exclusive collective-bargaining representative of the Solano/Napa clerks unit and since that date, UFCW 373 has been recognized as such representative by the Respondent, At all times since March 1, 1992, based on Section 9(a) of the Act, UFCW 373 has been the exclusive collective-bargaining representative of the Solano/Napa clerks unit.

(v)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in the grocery, bakery and deli departments in its present and future grocery stores, including concessions under the direct control of the Respondent, but excluding employees whose work is performed within a meat, culinary, prescription, or bakery production department location of the retail establishment, employees covered by another collective bargaining agreement, and supervisors within the meaning of the Act.

(v)(2) Since at least April 14, 1995, and at all material times, UFCW 381 has been the designated exclusive collective-bargaining representative of the Kitsap/North Mason grocery unit and since that date UFCW 381 has been recognized as such representative by the Respondent. At all times since April 14, 1995, based on Section 9(a) of the Act, UFCW 381 has been the exclusive collective-bargaining representative of the Kitsap/North Mason grocery unit.

(w)(1) The following employees of the Respondent (the Jefferson grocery unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in the grocery, bakery sales, snack bar, take-out food and deli,

salad bar, floral and non-food departments, including concessions under the direct control of the Employer, located in Jefferson/Clallam Counties, Washing-ton, but excluding employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, employees covered by any other collective bargaining agreement and supervisors within the meaning of the Act.

(w)(2) Since March 15, 1996, and at all material times, UFCW 381 has been the designated exclusive collective-bargaining representative of the Jefferson grocery unit and since that date UFCW 381 has been recognized as such representative by the Respondent. At all times since March 15, 1996, based on Section 9(a) of the Act, UFCW 381 has been the exclusive collective-bargaining representative of the Jefferson grocery unit.

(x)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Food Employers, Inc. and the employers who have authorized Food Employers, Inc. to bargain on their behalf, including the Respondent, in their current and future retail food stores located in Clark County, Washington, including Head Clerks, Journeyman and Apprentice Clerks, Courtesy Clerks in the grocery and ancillary departments, but excluding meat department employees, guards and supervisors within the meaning of the Act.

(x)(2) Since November 13, 1994, and at all material times, UFCW 555 has been the designated exclusive collective-bargaining representative of the Clark grocery unit and since that date, UFCW 555 has been recognized as such representative by the Respondent. At all times since November 13, 1994, based on Section 9(a) of the Act, UFCW 555 has been the exclusive collective-bargaining representative of the Clark grocery unit.

(y)(1) The following employees of the Respondent (the Portland grocery unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Food Employers, Inc. and the Employers who have authorized Food Employers, Inc. to bargain on their behalf, including the Respondent and employed at all present and future stores of the party Employer in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon including Head Clerk, Head Produce Clerk, Journeyman and Apprentice Clerks, Courtesy Clerks, Demonstrators, and Container Clerks, but excluding one (1) Store Manager, one (1) Assistant Manager, and in each store where ten (10) or more bargaining unit members are employed, up to two (2) additional exceptions, meat department employees and supervisors as defined in the Act.

(y)(2) Since November 13, 1994, and at all material times, UFCW 555 has been the designated exclusive collective-bargaining representative of the Portland grocery unit and since that date UFCW 555 has been recognized as such representative by the Respondent. At all times since November 13, 1994,

based on Section 9(a) of the Act, UFCW 555 has been the exclusive collective-bargaining representative of the Portland grocery unit.

(z)(1) The following employees of the Respondent (the Vancouver meat unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Head Meatcutters, Journeyman and Apprentice Meatcutters, Journeyman and Apprentice Wrappers, and Lead, Journeyman and Apprentice Service Counter Employees employed by the Respondent in its retail establishments located in the Vancouver and Camas, Washington vicinity, but excluding all other employees, and supervisors within the meaning of the Act.

(z)(2) Since November 13, 1994, and at all material times, UFCW 555 has been the designated exclusive collective-bargaining representative of the Vancouver meat unit and since that date, UFCW 555 has been recognized as such representative by the Respondent. At all times since November 13, 1994, based on Section 9(a) of the Act, UFCW 555 has been the exclusive collective-bargaining representative of the Vancouver meat unit.

(aa)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Head Meatcutters, Journeyman and Apprentice Meatcutters, Journeyman and Apprentice Wrappers and Lead Persons, and Journeyman and Apprentice Service Counter/Butcher Block employees, and Lead Persons, Journeyman and Apprentice Fish Counter Service employees employed by members of Food Employers, Inc. and of the employers who have authorized Food Employers, Inc. to bargain on their behalf, including the Respondent at all present and future stores of the party Employer in Multnomah, Washington, Columbia, and Clarkamas Counties, Oregon, but excluding all other employees, and supervisors within the meaning of the Act.

(aa)(2) Since November 13, 1994, and at all material times UFCW 555 has been the designated exclusive collective-bargaining representative of the Portland meat unit and since that time UFCW 555 has been recognized as such representative by the Respondent. At all times since November 13, 1994, based on Section 9(a) of the Act, UFCW 555 has been the exclusive collective-bargaining representative of the Portland meat unit.

(bb)(1) The following employees employed by the Respondent, herein called the UFCW 588 Northern California meat unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in the Meat and Service Fish Departments, including Head Meat Cutters, Journeyman and Apprentice Meat Cutters, Meat Clerks, Cashiers, Delicatessen Workers, Clean-Up Workers, Drivers, Fish Clerks and Fish Cutters in its retail markets in Sacramento County and the greater Sacramento area of California including Auburn, Placerville, and Woodland, California, Lake Tahoe and vicinity, Nevada, and Oroville, Marysville,

Yuba City and Grass Valley, California, but excluding all other employees, and supervisors within the meaning of the Act

(bb)(2) Since November 1, 1991, and at all material times, UFCW 588 has been the designated exclusive collective-bargaining representative of the UFCW 588 Northern California meat unit and since at least that date, UFCW 588 has been recognized as such representative by the Respondent. At all time since November 1, 1991, based on Section 9(a) of the Act, UFCW 588 has been the exclusive collective-bargaining representative of the UFCW 588 Northern California meat unit.

(cc)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees working in the Respondent's retail food stores in Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tuolumne, Yolo and Yuba Counties, California, Southwestern Washoe County, Nevada, (Tahoe Basin) and Northwestern Douglas County, Nevada (Tahoe Basin) but excluding meat department employees and supervisors within the meaning of the Act.

(cc)(2) Since March 1, 1992, and at all material times, UFCW 588 has been the designated exclusive collective-bargaining representative of the UFCW 588 Northern California grocery unit and since that date UFCW 588 has been recognized as such representative by the Respondent. At all times since March 1, 1992, based on Section 9(a) of the Act, UFCW 588 has been the exclusive collective-bargaining representative of the UFCW 588 Northern California grocery unit.

(dd)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in its retail establishments within the geographical exclusive jurisdiction of UFCW 839, covering Monterey, Santa Cruz, and San Benito Counties, California, but excluding meat department employees and supervisors within the meaning of the Act.

(dd)(2) Since March 1992, and at all material times, UFCW 839 has been the designated exclusive collective-bargaining representative of the UFCW 839 Master Food unit and since said date, UFCW 839 has been recognized as such representative by the Respondent. At all times since March 1, 1992, based on Section 9(a) of the Act, UFCW 839 has been the exclusive collective-bargaining representative of the UFCW 839 Master food unit.

(ee)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in its retail establishments within the geographical jurisdiction of UFCW 870, but excluding meat department employees and supervisors within the meaning of the Act.

(ee)(2) Since March 1, 1992, and at all material times, UFCW 870 has been the designated exclusive collective-bargaining representative of the UFCW 870 unit and since that date, UFCW 870 has been recognized as such representative by the Respondent. At all time since March 1, 1992, based on Section 9(a) of the Act, UFCW 870 has been the exclusive collective-bargaining representative of the UFCW 870 unit.

(ff)(1) The following employees of the Respondent, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in their grocery, bakery sales, snack bar, take-out food, salad bar, floral, non-food, and deli departments, in present and future grocery stores, including concessions under the Employers' direct control, located in King and Snohomish Counties, Washington, but excluding employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, employees covered by any other grocery contract and supervisory employees within the meaning of the Act.

(ff)(2) Since April 30, 1995, and at all material times, UFCW 1105 has been the designated exclusive collective-bargaining representative of the King/Snohomish grocery unit and since that date, UFCW 1105 has been recognized as such representative by the Respondent. Since at least April 30, 1995, based on Section 9(a) of the Act, UFCW 1105 has been the exclusive collective-bargaining representative of the King/Snohomish grocery unit.

(gg)(1) The following employees of the Respondent (the UFCW 1288 Master unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees working in the Respondent's retail food stores within the geographical jurisdiction of UFCW 1288 covering Fresno, Madera, Kings, Tulare, Merced, and Mariposa Counties, California, but excluding supervisors within the meaning of the Act.

(gg)(2) Since March 1, 1992, and at all material times, UFCW 1288 has been the designated exclusive collective-bargaining representative of the UFCW 1288 Master unit and since that date, UFCW 1288 has been recognized as such representative by the Respondent. At all times since March 1, 1992, based on Section 9(a) of the Act, UFCW 1288 has been the exclusive collective-bargaining representative of the UFCW 1288 Master unit.

(hh)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All Meat Managers, Journeyman and Apprentice Meat Cutters, Journeyman and Apprentice Meat Wrappers, and Service Counter Employees employed in markets located in Pasco, Kennewick and Richland, Washington by members of Allied Employers, Inc. and of the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including

the Respondent, but excluding all other employees and supervisors within the meaning of the Act.

(hh)(2) Since January 8, 1995, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Tri-Cities meat unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since January 8, 1995, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Tri-Cities meat unit.

(ii)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All Head Meat Cutters, Journeyperson and Apprentice Meat Cutters, Journeyperson and Apprentice Meatwrappers, and Butcher Block Employees employed by the Respondent at its markets in Spokane, Washington, but excluding all other employees, and supervisors within the meaning of the Act.

(ii)(2) Since January 1, 1994, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Spokane meat unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since January 1, 1994, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Spokane meat unit

(jj)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in its present and future retail establishments located in the Spokane metropolitan area and vicinity working in the grocery, produce, bakery sales, delicatessen, and general merchandise (non-foods or variety) departments, but excluding the store owner, store director, assistant store director, and one additional exempt employee chosen by the Respondent, and supervisors within the meaning of the Act.

(jj)(2) Since January 1, 1994, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Spokane grocery unit and since that time, UFCW 1439 has been recognized as such representative by the Respondent. At all times since January 1, 1994, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Spokane grocery unit.

(kk)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and the employers who have authorized Allied Employers, Inc. to bargain in their behalf, including the Respondent, in the grocery, bakery, snack bar, variety, deli, salad bar and floral departments of the employers' stores in Chelan, Douglas and Kittitas Counties, Washington, but excluding a store owner, store manager, assistant store manager, and one addi-

tional exempt employee selected at the sole discretion of the Respondent, and supervisors within the meaning of the Act.

(kk)(2) Since November 16, 1992, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Chelan unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since November 16, 1992, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Chelan unit.

(ll)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All employees of the Respondent in the grocery, bakery sales, snack bar, deli, bulk food and floral departments of the Respondent's present and hereafter acquired retail stores in Baker, LaGrande and Enterprise, Oregon, but excluding the Store Director, Assistant Manager, Deli Manager, Non-Food Manager and two additional exempt employees selected by the Respondent, and supervisors within the meaning of the Act.

(II)(2) Since September 8, 1991, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Baker grocery unit and since that time, UFCW 1439 has been recognized as such representative by the Respondent. At all times since September 8, 1991, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Baker grocery unit.

(mm)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Head Meat Cutters, Journeyperson and Apprentice Meat Cutters, Journeyperson and Apprentice Meatwrappers, and Service Counter Employees employed by the Respondent in its retail markets in Coeur d'Alene, Idaho, but excluding all other employees and supervisors within the meaning of the Act

(mm)(2) Since October 2, 1994, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Coeur d'Alene meat unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times October 2, 1994, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Coeur d'Alene meat unit.

(nn)(1) The following employees of the Respondent (the Lewiston grocery unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent at its present and future retail establishments located in the Lewiston-Clarkston Metropolitan area and vicinity in the grocery, produce, bakery sales, deli, general merchandise/non-foods or variety, bulk foods and floral departments, but excluding store owners or managers, assistant managers, and one additional exempt em-

ployee selected by the Respondent, and supervisors within the meaning of the Act.

(nn)(2) Since October 1, 1994, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Lewiston grocery unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since October 1, 1994, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Lewiston grocery unit.

(oo)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Head Meatcutters, Journeyperson and Apprentice Meatcutters, Journeyperson and Apprentice Weighers/Wrappers/Pricers, and Service Counter Employees employed by the Respondent, in the Lewiston-Clarkston metropolitan area, and vicinity but excluding all other employees and supervisors within the meaning of the Act.

(oo)(2) Since October 1, 1994, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Lewiston meat unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since October 1, 1994, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Lewiston meat unit.

(pp)(1) The following employees of the Respondent (the Yakima grocery/meat unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in the meat departments in Yakima and Kittitas Counties, Washington, and who are engaged in handling or selling merchandise in the present and future stores of the Employers' retail grocery establishments in Yakima and Skamania Counties, Washington, but excluding the store owner or manager, assistant manager, and supervisors within the meaning of the Act.

(pp)(2) Since October 1, 1995, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Yakima grocery/meat unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since October 1, 1995, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Yakima grocery/meat unit.

(qq)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by members of Allied Employers, Inc. and the employers who have authorized Allied Employers, Inc. to bargain on their behalf, including the Respondent, in the employers' present and future retail establishments located in the Pasco, Kennewick and Richland, Washington area, in the grocery, produce, bakery sales, delicatessen, general merchandise (non-foods or variety), bulk foods, and floral departments, but excluding the store owner or manager, assistant manager, one scan coordinator and supervisors within the meaning of the Act.

(qq)(2) Since January 8, 1995, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Tri-Cities grocery unit, and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since January 8, 1995, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Tri-Cities grocery unit.

(rr)(1) The following employees of the Respondent (the Coeur d'Alene grocery unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in its present and future retail establishments located in the Coeur d'Alene, Idaho metropolitan area and vicinity in the grocery, produce, bakery sales, general merchandise (non-foods and variety), bulk foods, floral and deli departments, but excluding the store owner or director, assistant store director, and one additional exempt employee selected by the Respondent, and supervisors within the meaning of the Act.

(rr)(2) Since April 14, 1995, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Coeur d'Alene grocery unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since April 14, 1995, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Coeur d'Alene grocery unit.

(ss)(1) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in their retail establishments in the Walla Walla, Washington metropolitan area in the grocery, produce, bakery sales, general merchandise (non-foods or variety), bulk food, floral, snack bar, takeout food and delicatessen departments, but excluding the store owner or director, assistant store director, delicatessen department manager, and one additional exempt employee selected by the Respondent, and supervisors within the meaning of the Act.

(ss)(2) Since May 18, 1995, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Walla Walla grocery unit and since that time, UFCW 1439 has been recognized as such representative by the Respondent. At all times since May 18, 1995, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Walla Walla grocery unit.

(tt)(1) The following employees of the Respondent (the Walla Walla meat unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Head Meatcutters, Journeyperson and Apprentice Meatcutters, Journeyperson and Apprentice Meatwrappers, and Journeyperson and Apprentice Service Counter Employees employed by the Respondent in its retail establishments within the Walla Walla, Washington metropolitan area, but excluding all other employees, and supervisors within the meaning of the Act.

(tt)(2) Since May 18, 1995, and at all material times, UFCW 1439 has been the designated exclusive collective-bargaining representative of the Walla Walla meat unit and since that date, UFCW 1439 has been recognized as such representative by the Respondent. At all times since May 18, 1995, based on Section 9(a) of the Act, UFCW 1439 has been the exclusive collective-bargaining representative of the Walla Walla meat unit.

(uu)(1) The following employees of the Respondent (collectively, the California grocery units) constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees, including employees of lessees, licensees and concessionaires, who perform work within food markets, discount stores, drug stores and shoe stores, presently operated and hereafter established, owned or operated by the Respondent within the geographical jurisdiction of UFCW Local Unions 135, 324, 770, 1036, 1167, 1428 and 1442, in the Respondent's grocery, produce, drug, delicatessen, general merchandise, bakery and liquor departments, but excluding all employees presently covered under a collective bargaining agreement with the Culinary Workers Union or persons employed in a complete restaurant, janitorial and/or maintenance employees, persons confining their work solely to demonstration, persons building promotional displays which do not include merchandise for selection or pick-up by customers, persons engaged exclusively in taking inventory, persons engaged in inspection of merchandise for the purpose of recommending changes to be made or services to be performed by Unit employees, store office employees, employees of suppliers of bread and cakes when delivered by bakery drivers, employees of suppliers of potato chips, corn chips and similar snack items, sales drivers delivery bulk and cellowrapped candy employees of suppliers of items requiring immediate refrigeration, overall store manager, assistant manager, and one additional third supervisory employee in each store that has a total interior square footage of 50,000 square feet or more as designated by the Respondent, and supervisory employees within the meaning of the Act.

(uu)(2) Since October 2, 1995, and at all material times, UFCWs 135, 324, 770, 1036, 1167, 1428, and 442 each has been the designated exclusive collective-bargaining representative of that geographical portion of the California grocery units described above in subparagraph 52(a) consistent with its geographical jurisdiction and since at least that date, UFCWs 135, 324, 770, 1036, 1167, 1428, and 1442 each has been recognized

as such representative by the Respondent. At all times since October 2, 1995, based on Section 9(a), UFCWs 135, 324, 770, 1036, 1167, 1428, and 1442 have been the exclusive collective-bargaining representatives of the California grocery units.

(vv)(1) The following employees of the Respondent (the Max Foods unit, constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Warehouse Clerks, Journeyman and Apprentice Meat Cutters, General Clerks, Meat Clerks, Service Delicatessen/Tortilleria/ Bakery Clerks, and Utility Clerks hired by the Respondent on and after January 3, 1994 in the Respondent's Max Foods retail establishments within the geographical jurisdiction of UFCWs 135, 324, 770, 1036, 1167, 1428 and 1442, but excluding office clerical employees, confidential employees, store director, assistant store director, third (3rd) person and fourth (4th) person, front end manager, guards and supervisors within the meaning of the Act.

(vv)(2) Since October 7, 1996, and at all material times, UFCWs 135, 324, 770, 1036, 1167, 1428, and 1442 each has been the designated exclusive collective-bargaining representatives of that geographical portion of the Max Foods units consistent with its geographical jurisdiction, and since that date, UFCWs 135, 324, 770, 1036, 1167, 1428, and 1442 each has been recognized as such representative by the Respondent. At all times since October 7, 1996, based on Section 9(a) of the Act, UFCWs 135, 324, 770, 1036, 1167, 1428, and 1442 have been the exclusive collective-bargaining representative of the Max Foods units.

(ww)(1) The following employees of the Respondent (the Idaho grocery unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent in its present retail stores covered by the collective bargaining agreement described below in paragraph 54(b) located in Boise and Nampa, Idaho, excluding employees working in the meat department of retail stores who are engaged in handling, cutting, selling, processing, wrapping or displaying meat, poultry, sausage, or fish, fresh, frozen, chilled or smoked in said department, bakers engaged in the production and preparation of bakery products, pharmacy employees, janitors, meat and bakery department clean-up employees, office clerical employees, scanning coordinators, floral clerks, produce managers, third person, assistant store directors, store directors, guards, watchmen, professional employees and supervisors as defined in the Act.

(ww)(2) Since June 5, 1995, and at all material times, UFCW 368A has been the designated exclusive collective-bargaining representative of the Idaho grocery unit and since at least that date, UFCW 368A has been recognized as such representative by the Respondent. At all times since June 5, 1995, based on Section 9(a) of the Act, UFCW 368A has been the exclusive collective-bargaining representative of the Idaho grocery unit.

(xx)(1) The following employees of the Respondent (the Contra Costa clerks unit, constitute a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees working in the Respondent's retail food stores within the geographical jurisdiction of UFCW 1179, but excluding meat department employees and supervisors within the meaning of the Act.

- (xx)(2) Since March 1, 1992, and at all material times, UFCW 1179 has been the designated exclusive collective-bargaining representative of the Contra Costa clerks unit and since at least that date, UFCW 1179 has been recognized as such representative by the Respondent. At all times since March 1, 1992, based on Section 9(a) of the Act, UFCW 1179 has been the exclusive collective-bargaining representative of the Contra Costa clerks unit.
- 4. The Respondent has engaged in the following unfair labor practices.
- (a) The Respondent has violated Section 8(a)(1) of the Act by:
- (1) Telling employees represented by a union during the Union's investigation of a grievance that the employees should report to the Union the Respondent's version of the facts and deny that the contract was violated.
- (2) Dealing directly with employees bypassing the Union and discouraging employees from supporting the Union by telling employees to deal directly with the store manager regarding grievances.
- (3) Maintaining and enforcing unlawful rules limiting employees union and protected concerted activities when employees are on company premises.
- (4) Threatening employees with discharge or other adverse consequences if they engaged in union and or protected concerted activities on the Respondent's premises.
- (5) Announcing and applying a store rule that applies only to the union steward for represented employees and to union materials which rules require that union materials may not be posted on company bulletin boards.
- (6) Maintaining rules preventing store employees from wearing union and/or protected concerted badges or pins without managerial approval at all times and in all areas of the Respondent's facilities and property.
- (7) Maintaining rules applying to State of California stores prohibiting nonemployees from soliciting or distributing materials or using sound equipment on the Respondent's premises including its parking lot and related areas.
- (8) Maintaining rules providing for immediate dismissal without prior warning for employees which rules prohibit without clarification or specificity employees disclosing confidential information, disregarding the Respondent's best interests or, off-the-job employee conduct which could have a negative impact on the Respondent's reputation or best interests.
- (b) The Respondent has violated Section 8(a)(3) and (1) of the Act by:
- (1) Issuing a written warning to employee Stuart Fishman for posting union materials on the Respondent's store bulletin board.

- (2) Issuing a written warning/discipline to employee Mary Ford for disclosing employee names to the Union for organizing purposes.
- (c) The Respondent has violated Section 8(a)(5) and (1) of the Act by:
- (1) Violating its duty to provide requested information to the Unions that represent its employees as follows:
- (i) Failing and refusing to acknowledge the filing of information requests in a reasonable and timely manner.
- (ii) Failing and refusing to respond to information requests in a reasonable and timely manner.
- (iii) Failing and refusing to provide the Unions that represent employees requested information in a reasonable and timely manner.
- (iv) Failing to and refusing to honestly and accurately report to Unions that request information the existence or nonexistence of the requested information.
- (v) Failing and refusing to provide reasonable and appropriate staff and other resources to the task of responding to union information requests.
- (vi) Delaying or withholding responses to union information requests because of doubts concerning or disagreements with the unions grievance's merits or procedural correctness and completeness.
- (vii) Failing and refusing to provide the Unions the information they requested directly from our Boise, Idaho offices, but rather sending the information to the local store for examination and copying there by the Union.
- (vii) Failing and refusing to directly provide copies of requested information respecting large numbers of entries and data, to the Unions of represented employees in compiled, tabulated, collected, or other form of data base printouts or other compilation.
- (viii) Unilaterally determining, without communication with or permission of the requesting Union, that earlier requested information is no longer desired by the Union.
- (ix) Determining the relevance of requested information based on an opinion on whether the information would be of use to the Respondent, or whether the information had been used by the Respondent in evaluating the grievance, and refusing to provide the information based on such determinations.
- (x) Requiring unions to obtain and extract requested information from voluminous records provided at our stores and disclosed only by dictation or inspection and/or only provided for hand or store based photocopying.
- (xi) Refusing to provide requested information to the Unions based on the confidentiality of all or part of the information requested or because other information contained on the documents requested is confidential, without offering to engage in bargaining respecting alternative means and methods of disclosure of the information and the prevention of its unnecessary dissemination
- (2) Unilaterally implementing, without notice to or an opportunity to bargain provided to United Food and Commercial Workers, Local 555, new rules respecting Oregon State employees, providing for automatic discharge of employees who on a first-offense basis sell tobacco or alcohol to underage customers.

- (3) Dealing directly with employees by telling them in a memorandum that the Respondent requested that they give the Respondent any information about off-the-clock work that they had given the Union and, that, if they would send in any information regarding off-the-clock work that they had given the Union directly to the Respondent, the Respondent would quickly correct and remedy any problems revealed.
- 5. The unfair labor practices found above have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.
- 6. The Respondent has not otherwise violated the Act as alleged. The allegations of the complaint found to be without merit above will be dismissed.
- 7. The settlement agreement in Case 27–CA–15677–17, formerly numbered Case 20–CA–27340, shall be reinstated and the complaint allegations based thereon shall be dismissed.

[Recommended Order omitted from publication.]